Dallas & Mavis Specialized Carrier Co. *and* International Brotherhood of Teamsters Local No. 142.[1] Cases 13–CA–39115, 13–CA–39269, and 13–CA–39311

January 23, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 31, 2001, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[3]

Dallas & Mavis Specialized Carrier Company (the Respondent) maintained an operation to transport primarily Chrysler engines and automobile parts between facilities in Kenosha, Wisconsin, and several other locations. The Respondent's employees were truckdrivers for this operation (Chrysler operation), as well as for a "dedicated run" (covering the same route every day) between Belvidere, Illinois, and Toledo, Ohio. The employees initiated an organizing campaign when a majority of the truckdrivers attended a union meeting on January 20, 2001.[4] Twenty employees in attendance signed a petition for representation by the International Brotherhood of Teamsters, Local 142 (the Union) and an open letter to the Respondent's managers by which the employees agreed to be on the Union's organizing committee. On January 24, Union Business Representative Larry Regan told the Respondent's president of operations, Michael Berman, that a majority of the employees had memorialized support for the Union. Regan asked that the Respondent voluntarily recognize the Union as the drivers' bargaining representative. The Union sent the organizing letter to the Respondent by facsimile and certified mail on January 30, and it presented the petition to the Respondent on February 15. The Respondent voluntarily recognized the Union on February 15,[5] and the parties subsequently held two bargaining sessions. The Respondent closed the Chrysler operation on March 31 after it lost the Chrysler contract, terminating all unit employees on or before this date. However, it continued to operate the "dedicated run" until May, using owner-operators in place of the terminated drivers. The judge found that the Respondent committed several unfair labor practices, discussed below, during the weeks following the January 20 union meeting.

I. THE 8(A)(1) ALLEGATIONS

A. Greene's Statements

Chester Stallings was one of two drivers who arranged the initial organizing meeting at the Union's hall in Gary, Indiana, on January 20. It is undisputed that the Respondent's general operations manager, Derrell Greene, learned about this meeting from the Respondent's dispatchers. On January 22, 2 days after the meeting, Stallings called dispatcher Kathy Koehler to obtain his next driving assignment. Koehler said Greene wanted to speak to Stallings. Greene asked Stallings, "What's going on?" When Stallings asked Greene what he meant, Greene said, "I heard that you [sic] all going union and that if you go union that they [the Respondent] would have to ask Chrysler for some more money and Chrysler wouldn't give it to them" because "Chrysler already wanted them to go 18% lower on the contract" and "they would have to close the doors."

We adopt the judge's finding that Greene's statements violated Section 8(a)(1) by threatening plant closure and by conveying the impression of surveillance of union

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to our findings and to the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container, Inc*., 325 NLRB 17 (1997). We shall also substitute a new notice in accordance with the Order as modified and with our decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] All dates are in 2001 unless otherwise stated.

[5] We disavow the judge's statement that the Respondent's general operations manager, Derrell Greene, unwittingly recognized the Union by reviewing the Union's petition and signed authorization cards on February 15. The Respondent did more than simply review the Union's petition and cards. It explicitly recognized the Union.

activities. As to the threat, we agree with the judge that Greene did not make a prediction of plant closure based on objective facts or refer to demonstrably probable consequences beyond the Respondent's control. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

As to the impression of surveillance allegation, the test applied by the Board is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993). In this instance, without explanation or apparent legitimate purpose, Greene intervened in a routine dispatch conversation to inform Stallings, one of two principal employee organizers, that he was aware of the union effort. Stallings had not previously informed Greene that he supported the Union, that an organizing campaign had begun, or that employees had attended a union meeting 2 days earlier. He had not discussed the topic with Greene at all. Further, at this point, employee organizational activity was not open and well known. Indeed, the only group meeting was held at the Teamsters' union hall in Gary, Indiana, many miles from the Respondent's facility. Under these circumstances, we find that Stallings reasonably would have concluded from Greene's statement that Greene had become aware of Stallings' union involvement, and that he was letting Stallings know that the Respondent was monitoring this activity.[6] We therefore agree with the judge that Greene's statements created an unlawful impression of surveillance.[7]

B. Gray's Statements

We also adopt the judge's finding that head dispatcher Denise Gray's statements to employee Alfred Hester violated Section 8(a)(1).[8] At the end of January, sometime after the January 20 union meeting, Gray asked Hester during a work-related telephone conversation whether the employees were forming a union. Gray then continued, "[t]he company is not going to let this happen if you guys do this, I mean, they're not going to let us tell them how to run this company or what to do." Gray further stated that if the Union came in, "[t]hey might just close the company down." We agree with the judge's findings that Gray is the Respondent's agent[9] and that her statements constituted an unlawful threat of plant closure.

II. THE 8(A)(3) ALLEGATIONS[10]

A. Change in Paycheck Distribution Policy

Before the Union's campaign, employees picked up their weekly paychecks on Wednesdays at the Respondent's office in Kenosha, Wisconsin. Greene testified that if the receptionist was not in the employees called the dispatcher and asked for their checks to be brought downstairs to them. Either a dispatcher or the payroll clerk would then deliver the check. Although company policy generally precludes employees from walking to the upstairs office area where the dispatchers worked, one driver testified he was allowed to do so to pick up his check. Other drivers testified that dispatchers would sometimes even drop checks to them from an upstairs window.

On January 24, after the Respondent laid off its receptionist, Gray informed employees that they could no longer pick up their paychecks, which would instead be mailed to their homes. If an employee needed the check by Thursday, he or she could pay $7.50 per check to have it sent by overnight Federal Express. Gray's message did not state any reason for the change in policy. Several days later, in response to numerous employee complaints, the Respondent reverted to its prior policy, allowing employees to pick up their paychecks at the Kenosha office.

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[6] An impression of surveillance violation does not require a finding that the employer obtained knowledge of the employees' activities by unlawful means. *Frontier Telephone of Rochester*, 344 NLRB No. 153, slip op. at 7 fn. 19 (citing *United Charter Service*, 306 NLRB 150, 151 (1992)).

[7] Member Schaumber would dismiss the unlawful impression of surveillance allegation because he finds that the statement "I heard that you [sic] all going union" does not refer to the meeting or to any specific protected activity other than the general implication that Greene had heard about the union campaign. Nor did Greene convey or imply any surreptitious manner by which he obtained this information. Member Schaumber agrees with his colleagues that obtaining knowledge of union activity by unlawful means is not a prerequisite to finding a violation. Nonetheless, he believes that the openness with which Greene conveyed his knowledge of the organizing campaign, without indicating any covert or surreptitious monitoring of employee activity, is a relevant circumstance in determining what a reasonable employee would infer from Greene's statements.

[8] In their briefs, both parties addressed the issue of whether Gray's statements created an unlawful impression of surveillance. However, the complaint does not allege that the Respondent created the impression of surveillance through Gray's statements, nor did the judge specifically find such a violation. Accordingly, we address only the issue of whether Gray unlawfully threatened that the Respondent would close its facility.

[9] We do not rely on the judge's finding that the similarity between the plant closure threats by Gray and Greene gave drivers another reason to believe that Gray spoke as management's agent. Absent evidence that Greene's statements to Stallings were disseminated to anyone else, there is no basis for finding drivers could make this comparison.

Member Schaumber finds it unnecessary to pass on this 8(a)(1) allegation because it is cumulative and does not affect the remedy.

[10] As discussed infra at fn. 15, we find it unnecessary to pass on whether the Respondent's transfer of unit work violated Sec. 8(a)(3).

Applying *Wright Line*,[11] the judge found that the Respondent violated Section 8(a)(3) by changing its paycheck distribution policy. The timing and abrupt nature of the decision, on the first payday after the Respondent had heard about its employees' union activities and had responded with threats to close its doors, demonstrated the Respondent's antiunion animus. The judge also found that the Respondent did not meet its rebuttal burden under *Wright Line*. Emphasizing that the Respondent's purported reason for the policy change—the layoff of the receptionist—was not conveyed to employees at the time of the change, the judge essentially found that this purported reason was a mere pretext for its actual unlawful motivation. We agree.[12] We do not doubt that the loss of a receptionist could be a legitimate reason for changing the method of paycheck distribution. However, in light of alternative paycheck distribution methods used by the Respondent before this change, we find that the Respondent has failed to show that those methods were no longer feasible. The Respondent chose a wholly new method of distribution, which method was time-consuming and costly. Given the timing, we believe that the Respondent has not shown that it would have chosen this method absent union activity. For these reasons, we agree with the judge that the Respondent violated Section 8(a)(3) by changing its paycheck distribution policy.[13]

B. Discharges of Bigheart, McCall, and Rice

On January 26, the Respondent terminated Madonna Bigheart, Leslie McCall, and Dennis Rice for refusing to take a "broker load" (i.e., any load other than a Chrysler load) to New York. Union activist Stallings also refused a broker load on that day but was not disciplined. The judge concluded that the discharges violated Section 8(a)(3). He found that the General Counsel satisfied his burden under *Wright Line*, supra, of proving that the Respondent knew of the alleged discriminatees' involvement in protected activity, harbored union animus, and took adverse action against those employees based on this animus. Contrary to the judge, we find that the General Counsel failed to meet his initial burden of proving the Respondent's knowledge of the discharged drivers' union activities.

All three employees attended the January 20 union meeting, signed the representation petition and organizing committee letter, and wore "Vote Teamsters" buttons on the job. Rice also solicited two employees to sign authorization cards (the employees did not sign because they had already signed cards). However, the Respondent had not received the petition or organizing committee letter by January 26. McCall and Rice each testified that no supervisor or manager ever saw him wearing his union button or spoke to him about the campaign. Additionally, there is no evidence that any supervisor or manager saw Bigheart wearing her union button. Although dispatcher Dan Lexer spoke to Bigheart about the Union, he was not alleged to be a supervisor or agent of the Respondent. Furthermore, the nature of the Respondent's business does not require employees to visit the Kenosha office except when picking up their paychecks. Employees receive their assignments by telephone or by computer messages from the dispatchers, and they perform their duties on the road and at facilities located some distance away from the Kenosha office. There was little opportunity for the Respondent's management to observe any driver wearing a union button, and all other union activity took place away from the Respondent's premises.

Notwithstanding the above, the judge inferred the Respondent's knowledge of the three drivers' union activity from its general knowledge of the January 20 union meeting, the Union's recognition demand and claim that a majority of employees supported the Union, the timing of the discharge 2 days after the Union's recognition demand, and what the judge found to be pretextual reasons asserted for the discharge. We find that these fac-

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel meets his or her initial evidentiary burden by establishing that: (1) the employee engaged in protected activity; (2) the employer knew of that activity; and (3) the employer demonstrated animus toward that activity. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer "to demonstrate that that same action would have taken place even in the absence of the protected conduct." See *Webasto Sunroofs*, 342 NLRB No. 124, slip op. at 3–4 (2004). Member Schaumber would find that the General Counsel must also show a causal nexus between the Sec. 7 animus and the adverse employment action. See *Shearer's Foods, Inc*., 340 NLRB 1093, 1094 fn. 4 (2003), for further explanation.

[12] We note as well that the burden of distributing checks did not necessarily fall entirely on dispatchers in the absence of a receptionist. Greene testified that the payroll clerk sometimes performed this function, and there is no evidence that she did not remain employed and available to do so throughout the relevant period.

[13] Member Schaumber finds that the Respondent did not violate Sec. 8(a)(3) by changing its paycheck policy. The Respondent changed its policy in response to the loss of its receptionist who normally distributed paychecks. Upon learning of the hardship caused to employees, the Respondent promptly reinstated its prior policy. He finds that, even assuming arguendo that the General Counsel satisfied its initial *Wright Line* burden, the Respondent met its rebuttal burden. The increased burden on dispatchers to distribute all paychecks from an area in which employee access is prohibited is a legitimate business reason for deciding to mail paychecks instead, notwithstanding the fact that dispatchers occasionally distributed paychecks when the receptionist was unavailable. The fact that the Respondent was willing to shoulder this additional burden when its employees complained does not detract from the legitimacy of its asserted reason for the paycheck distribution change.

tors are an insufficient basis for inferring that the Respondent knew or suspected that Bigheart, McCall, and Rice were union supporters when it discharged them on January 26. As of this date, the Respondent certainly had reason to believe that many of its employees were engaged in union activity but, apart from Stallings, there is no evidence showing why it would know or suspect the involvement of any particular employee. Further, while the discharges took place soon after the Union's recognition demand, they took place *immediately* after the drivers' undisputed refusals to accept broker load assignments. Even if the Respondent's determination to discharge them for their refusals was unfair or arbitrary, there can be no inference that it acted based on knowledge of union activity in light of the fact that it failed to discipline known union activist Stallings for the same conduct on the same day.[14]

Our dissenting colleague builds inference upon inference in a vain attempt to show knowledge of the three employees' union activity on January 20. She infers that it is "likely" that informants attended the meeting. She further infers that the Respondent "likely" learned from these informants that the three had signed the prounion petition and letter. In our view, these inferences are not an adequate substitute for evidence. Consequently, we find that the General Counsel did not meet his initial *Wright Line* burden of proving that the Respondent had knowledge of the alleged discriminatees' protected activities.[15] We reverse the judge and dismiss the allegations of unlawful discharge.

C. Discharge of Brooks

The Respondent terminated John Brooks on January 30 after Ryder, from whom the Respondent leased its trucks, informed the Respondent that Brooks was outside of their insurance guidelines due to his poor driving record. In December 2000, the Respondent received a report from Ryder's insurance company, listing several moving violations that Brooks had committed and directing the Respondent to take appropriate action. The Respondent had previously placed Brooks on probation after it received a similar report from Ryder's insurance company.

Brooks did not testify because he was unavailable, and the judge rejected his Board affidavit as a proposed exhibit. Employee Chester Stallings testified that he witnessed Brooks signing an authorization card on January 21, and he saw Brooks wearing the union button he gave him. However, there is no evidence that any supervisor or manager had ever seen Brooks wearing his union button, signing an authorization card, or otherwise engaging in protected activity. Likewise, there is no evidence that any supervisor or manager ever spoke to Brooks about the Union. Brooks did not attend the union meeting on January 20 or sign the petition or letter presented to employees at that meeting. The authorization card that he

[14] We reject as pure speculation the judge's surmise that the Respondent "appreciated it would be more subtle" to act against "less vocal Union supporters." As stated above, there is insufficient evidence that the Respondent knew Bigheart, McCall, and Rice were union supporters at all.

[15] Member Liebman would adopt the judge's findings that the Respondent knew of these employees' union activities and discharged them unlawfully. She relies on *Kajima Engineering & Construction*, 331 NLRB 1604 (2000), which holds that an employer's knowledge of an employee's union activity can be inferred from the employer's knowledge of general union activity, its antiunion animus, the timing of the discharge, and the employer's pretextual reasons for the discharge. Each of these criteria for inferring the Respondent's knowledge exists here. The Respondent was admittedly aware of general union activity, and it demonstrated antiunion animus by conduct that included violations of Sec. 8(a)(1), (3), and (5). Moreover, the timing is highly suspicious: as the majority acknowledges, the Respondent fired McCall, Rice, and Bigheart less than a week after the initial union meeting and only 2 days after the Respondent learned that most employees supported the Union and unlawfully changed its paycheck distribution policy. Finally, the judge appropriately found that the Respondent's asserted reason for these discharges was pretextual: the new policy making broker loads mandatory, which the terminated employees had purportedly violated, had not been disseminated to drivers and apparently did not apply to all drivers.

In Member Liebman's view, additional evidence supports the inference that the Respondent knew of McCall, Rice, and Bigheart's union activity. Significantly, all four employees wore union buttons after they attended the January 20 union meeting. At that meeting, these employees signed a petition authorizing the Union to represent them and a letter identifying themselves as members of the union committee. The Respondent acknowledged that it utilized informants to obtain information about the Union's campaign; some of these informants likely attended the January 20 meeting, which the Respondent learned about before it occurred. Thus, the Respondent likely knew who had signed the prounion petition and letter long before the Union sent it copies of the documents. Dispatcher Lexer approached Bigheart on January 24, 2 days before her termination—at a time when Bigheart would have had a union button pinned to her purse—and stated that he had heard that the drivers were going into the Union. Bigheart responded that they were trying. Although the majority correctly points out that Lexer was not alleged or found to be a supervisor, his role as a dispatcher would support a finding that he was an agent of the Respondent, just as dispatcher Gray was. Moreover, the dispatchers (specifically, Gray and Koehler) had initially informed the Respondent of the January 20 union meeting, suggesting that they were among its informants. Finally, McCall testified without contradiction that he was wearing his union button when he went to pick up his paycheck from the Respondent's receptionist on January 24, and the judge found that the receptionist saw both McCall and Bigheart wearing their buttons on that day. This was the same day that Lexer spoke with Bigheart, and was 2 days before their terminations. The foregoing evidence, in the aggregate, provides sufficient basis for a conclusion that the Respondent knew of Bigheart, McCall, and Rice's union activity when it terminated their employment.

signed was not presented to the Respondent until February 15.

The judge based his finding that the Respondent violated Section 8(a)(3) by discharging Brooks on the same circumstantial evidence discussed above regarding the discharges of Bigheart, McCall, and Rice. However, for the reasons discussed above, we find that the General Counsel failed to establish that the Respondent had knowledge of Brooks' union activity by January 30, the date it discharged him.[16] In sum, in the absence of any evidence whatsoever that any supervisor or manager was aware of the limited protected activity in which Brooks participated, we reverse the judge and dismiss the 8(a)(3) allegation pertaining to Brooks.[17]

III. THE 8(A)(5) ALLEGATIONS

A. Effects of Closing Chrysler Operation

On March 30, at the parties' second bargaining session, Regan and Berman discussed the effects of the Respondent's decision to close the Chrysler operation. Regan requested that the Respondent maintain some employees, selected on the basis of seniority, in its other divisions or for broker loads, and that it grant other employees a severance package consisting of vacation pay and 2 months' severance pay and health insurance. Berman agreed to get back to Regan. On April 2, Berman sent Regan a seniority list he had requested. Regan testified that at that time, he was under the impression that the parties would go back to the bargaining table to negotiate the items he had requested at the March 30 meeting, after identifying the most senior employees.

On April 3, Berman sent a letter to Regan, in which he summarily rejected all of the Union's proposals regarding the effects of the closure, except for vacation pay. The letter contained no explanations for rejecting Regan's proposals, nor did it contain any counterproposals or indications that the Respondent was willing to engage in further bargaining.[18] On April 10, Regan sent a letter to Berman requesting further bargaining about these outstanding issues, stating the Union's belief that the Respondent did not adequately address issues raised during bargaining, as well as its belief that the Respondent's asserted inability to find work for drivers was false and inaccurate.[19] Berman did not respond to Regan's April 10 letter, nor did Berman return Regan's subsequent telephone calls. Berman acknowledged that he never indicated to the Union that he thought the parties were at impasse.

The judge found that the Respondent violated Section 8(a)(5) by failing to bargain about the effects of its decision to close the Chrysler operation, as it was obligated to do pursuant to *First National Maintenance Corp.*, 452 U.S. 666 (1981).[20] We agree with the judge that the Respondent failed to fulfill this bargaining obligation. In doing so, we find that the Union's April 10 letter, its actions at the bargaining table, and its repeated attempts to reach Berman after its letter went unanswered clearly evinced a request for further bargaining after the Respondent's April 3 letter. Even though the Respondent began bargaining on April 3 by listening to the Union's proposals regarding effects of the closure and providing a response, the Respondent failed to engage in further requested bargaining thereafter. There was no impasse or other valid reason to stop bargaining.[21] Therefore, we find that the Respondent violated Section 8(a)(5) by its failure to bargain with the Union over the effects of its decision to close the Chrysler operation.

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[16] There is even less warrant, if any, for inferring the Respondent's specific knowledge of Brooks' union activity from its general knowledge of employees' union activity than in the case of the prior discharges of Bigheart, McCall, and Rice. On January 30, the date of Brooks' discharge, the Respondent received from the Union the organizing committee letter signed by 20 drivers. Brooks was not one of them.

[17] Member Liebman assumes that the General Counsel met his initial burden, under *Wright Line*, supra, to demonstrate that the Respondent's termination of Brooks was motivated by antiunion animus, but she finds that the Respondent has demonstrated that it would have discharged Brooks even absent his union activity. She finds that the Respondent's receipt in December 2000 of the insurance company's audit of Brooks' driving record and its request that the Respondent take action in accordance with that audit supports the Respondent's decision to terminate Brooks' employment in January.

[18] The portion of the letter responding to the Union's proposals stated:

- DUE TO THE LOSS OF EQUIPMENT AND INABILITY TO SECURE VOLUME TRUCKLOAD TRAFFIC, DMSCC DOES NOT INTEND TO CONTINUE IN THIS BUSINESS ENVIRONMENT.
- DRIVERS TERMINATED ON 3/31/01 WILL RECEIVE NO SEVERANCE OR COMPANY PAID INSURANCE AS REQUESTED. INSURANCE INFORMATION (COBRA) WILL BE FORWARDED TO EACH OF THE DRIVERS.
- DRIVERS WILL RECEIVE ACCRUED HOLIDAY PAY AS DISCUSSED.

[19] The letter stated, inter alia:

The Union's Committee believes that you did not adequately address issues that were brought up during negotiations. . . . Our research and experience has proven that this statement [about "loss of equipment and inability to secure volume truckload traffic," see fn. 20] is false and inaccurate. Your company has at least fifty (50) terminals and agents national [sic] wide, including Canada. Your agents found plenty of work for these drivers in the past.

[20] The General Counsel does not contend that the Respondent had a duty to bargain about its decision to close the Chrysler operation.

[21] We therefore need not rely on the judge's finding that the Respondent failed to provide the Union with adequate preimplementation notice of its decision to close.

B. Decision to Transfer Belvidere-Toledo Run to Owner-Operators and Effects of Decision

As stated above, the Respondent terminated all unit employees, including drivers who covered the Belvidere-Toledo run, by March 31. The following week, the Respondent transferred the Belvidere-Toledo run to owner-operators: independent contractor, nonunion drivers who owned their own Ryder trucks. The Respondent continued to operate the Belvidere-Toledo run using owner-operators until May 5, when it permanently shut down this portion of its operation. Berman admitted that he did not provide notice to the Union or an opportunity to bargain about this transfer of work or its effects, although negotiations with the Union were still ongoing when he made the work-transfer decision at the end of March.

Former unit employees discovered the transfer of the Belvidere-Toledo run when they saw the Respondent's truck trailers on the road and talked to owner-operators on the CB radio. Employees informed Regan of this discovery on April 14 or 15; prior to that time, the Union had understood that the entire Chrysler operation had been shut down on March 31, including the Belvidere-Toledo run. After hearing from the former employees that the Belvidere-Toledo run was being done by owner-operators, Regan left telephone messages with Berman's secretary asking Berman to call him to talk about this issue. Berman admits that he never returned Regan's calls, although he had Regan's telephone number and knew how to reach him. Regan did not thereafter request bargaining in writing; he testified that he relied on his April 10 letter and subsequent telephone messages to Berman to convey his request for bargaining about the transfer of the Belvidere-Toledo run. Regan subsequently filed unfair labor practice charges with the Board regarding this work transfer.

We agree with the judge that the Respondent's transfer of unit work violated Section 8(a)(5).[22] The decision is a mandatory subject of bargaining pursuant to *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), and *Torrington Industries*, 307 NLRB 809 (1992). We reject the Respondent's argument that the decision to replace employee drivers with owner-operators was a change in the scope, nature, and direction of its enterprise pursuant to *First National Maintenance Corp. v. NLRB*, supra. The Respondent's transfer of the Belvidere-Toledo run to the owner-operators involved "nothing more than the substitution of one group of workers for another to perform the same work." *Gaetano & Associates*, 344 NLRB No. 65, slip op. at 3 (2005) (citing *Fibreboard* and *Torrington*, supra). See also *Naperville Ready Mix, Inc.*, 329 NLRB 174, 181 (1999), enfd. 242 F. 3d 744 (7th Cir. 2001), cert. denied 534 U.S. 1040 (2001) (employer's continued delivery of its product to construction sites through an elaborate subcontracting arrangement with "owner-drivers," where the only difference was that the work was formerly performed by bargaining unit drivers, was a mandatory subject of bargaining). The Respondent failed to give the Union notice and an opportunity to bargain about this decision or its effects.

Finally, we reject the Respondent's argument that the Union waived its right to bargain by failing to request bargaining in writing. The Union's April 10 letter requesting further bargaining over outstanding issues encompasses a request to bargain about the transfer of work, notwithstanding that the Union was led to believe that the Belvidere-Toledo run was part of the closure and only later discovered that the Respondent was continuing this part of the operation. In any event, Regan requested bargaining once he discovered the transfer by contacting Berman through his secretary, despite Berman's attempt to avoid the request. See *Essex Wire Corp.*, 130 NLRB 450, 457 (1961), and cases cited therein (request to bargain need not be in writing). For these reasons, the Respondent's actions violated Section 8(a)(5).

AMENDED REMEDY

The General Counsel excepts to the judge's failure to specifically order a conditional backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), for unit employees who were terminated on or about March 31, when the Respondent closed its Chrysler operation. The General Counsel also requests an additional backpay remedy for unit employees affected by the Respondent's transfer of the Belvidere-Toledo run to owner-operators, from the date of their termination on March 31 to May 5, when the Respondent finally shut down the Belvidere-Toledo run. We grant these requested remedies.

As a result of the Respondent's unlawful refusal to bargain about the effects of its decision to close, the terminated unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to

[22] In light of this conclusion, we find it unnecessary to pass on the judge's finding that the Respondent's transfer of unit work also violated Sec. 8(a)(3), because such a finding would have no material effect on the remedy.

make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp*., supra, as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure of the Chrysler operation on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were terminated to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

In addition, those unit employees affected by the Respondent's transfer of the Belvidere-Toledo run to owner-operators, shall receive backpay from the date of their termination on March 31 to May 5, 2001, when the Respondent finally shut down the Belvidere-Toledo run.

Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dallas & Mavis Specialized Carrier Co., Kenosha, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b), delete paragraph 2(c), and reletter the following paragraphs accordingly.

"(b) Pay backpay to the unit employees terminated in March 2001 as a result of the Respondent's closure of its Chrysler operation in the manner set forth in the amended remedy section of this decision."

2. Substitute and reletter the following for paragraph 2(e).

"(d) Within 14 days of service by the Region, mail a copy of the attached notice marked "Appendix"[23] to the Union and to all the employees who were employed out of its place of business in Kenosha, Wisconsin, at any time since January 22, 2001. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 23, 2006

Robert J. Battista	Chairman
Wilma B. Liebman	Member
Peter C. Schaumber	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closure of our operation if you select the International Brotherhood of Teamsters, Local No. 142, or any other union, as your collective-bargaining representative.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT unlawfully modify our paycheck distribution policy.

WE WILL NOT unlawfully discharge employees.

WE WILL NOT unlawfully transfer unit work to owner-operators.

WE WILL NOT unlawfully fail and refuse to bargain collectively with the International Brotherhood of Teamsters, Local No. 142 about the effects of our decision to close our Chrysler operation and about our decision to transfer unit work to our owner-operator drivers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union concerning the effects of our decision to close the Chrysler operation, and concerning the decision to transfer unit work to our owner-operator drivers.

WE WILL make whole, with interest, unit employees for losses of pay and benefits suffered as a result of our decision to transfer their work to our owner-operator drivers and WE WILL pay limited backpay to all unit employees terminated in March 2001 as a result of our closure of the Chrysler operation.

DALLAS & MAVIS SPECIALIZED CARRIER CO.

Edward Castillo, Esq., for the General Counsel.
C. John Holmquist, Jr., Esq. and *Rachele L. Lyngklip, Esq. (Dickenson Wright PLLC),* of Bloomfield Hills, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. International Brotherhood of Teamsters, Local No. 142, AFL–CIO (the Union) filed charges against Dallas & Mavis Specialized Carrier Co. (Respondent). A consolidated complaint and notice of hearing was issued on May 31, 2001.[1] It alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by, on more than one occasion, threatening employees with closure of its operations if employees selected the Union as their collective-bargaining representative, and by creating the impression that employees' union activities were under surveillance; that the Respondent violated Section 8(a)(1) and (3) of the Act by modifying its paycheck distribution policy, by discharging Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks, and by transferring unit work to owner-operator drivers because of employees union and concerted protected activity and in order to discourage employees from engaging in such activities; and that Respondent violated Section 8(a)(1) and (5) if the Act by failing and refusing to bargain collectively with the Union about the effects of its decision to close its Chrysler operation and its decision to transfer unit work to its owner-operator drivers. The Respondent denies these allegations.

A hearing was held on October 2, 3, and 4 in Chicago, Illinois. Upon the entire record in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with a place of business in Kenosha, Wisconsin, has been engaged in the interstate transportation of freight. The complaint alleges, the Respondent admits, and I find that at all times material herein, Respondent has been an employee engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

THE FACTS

Part of the Respondent's operation involved what is referred to as the Daimler/Chrysler Kenosha Engine Shuttle, which the Respondent commenced in the beginning of 1999. The operation involved transporting Jeep Cherokee engines from the Chrysler plant in Kenosha to plants in Detroit, Michigan, and Toledo, Ohio. The Respondent was also used by Chrysler to transport return loads of racks for engines or parts back to the Kenosha area. Additionally, the Respondent assigned six drivers to a Belvidere, Illinois to Toledo, Ohio dedicated run for Chrysler. The involved employees of the Respondent utilized equipment which was leased from Ryder Leasing, which also maintained the equipment. Derrell Greene, the Respondent's general manager of operations, was the only manager in the Kenosha office for the Chrysler operation, and he was in charge of this operation. Greene worked from 7 a.m. to 7 p.m. Monday through Friday. He utilized three dispatchers, one for each of the three shifts. Dispatcher Denise Gray worked from 6 a.m. to 3 p.m.; dispatcher Cathy Koehler worked from 2 to 11 p.m.; and dispatcher Dan Lexer worked from 10 p.m. to 7 a.m. The involved drivers were paid by the mile on a weekly basis. There were 40 drivers involved in this operation when it ceased in March 2001.

According to the testimony of Greene, in July or the summer of 2000 Chrysler extended its normal 2-week shut down (vaca-

[1] All dates are in 2001 unless otherwise indicated.

tion) to 3 or 4 weeks at many of its plants because of industry conditions. Greene testified that some of the drivers in the Chrysler operation requested the Respondent to get other freight during this period;[2] that in November 2000 Chrysler started shutting down plants and it advised the Respondent the week before the shut down; that the Respondent handled broker loads during this period; and that he and Michael Berman, who is the President of the Respondent and is present at Respondent's Kenosha facility about 10 to 15 percent of his work week, told dispatchers in July 2000 to tell the drivers that if they did not want to handle a broker load they should turn in their trucks, this policy was renewed "vigorously" (Tr. 422) in November 2000, and the dispatchers were reminded almost on a daily basis of the renewal of the policy. On cross-examination Greene testified that he did not provide written notice to the drivers in July or November 2000 or at any other time that they could be terminated for refusing broker loads; that he did not know that the drivers who handled Chrysler loads were told when they were hired that they would only be handling Chrysler loads; that several drivers told him that they had only hired for Chrysler loads; and that most of the involved drivers told him this.

Greene testified that he drafted a letter dated January 15, Respondent's Exhibit 1. The letter reads, as here pertinent, as follows:

> As you are well aware, the automotive industry has taken a downturn in business and this has caused a major ripple effect in the economy. Just in the past couple of weeks two of our key competitors have filed bankruptcy due to the downtrend in the automotive industry. Over the past two months DC [Daimler Chrysler] has shut down some of their plants to offset some of its losses. Shutting down these plants has of course required Dallas & Mavis to find additional van loads until the plants are up and running again. Many of you have expressed to me that you only signed on to move DC freight. In turn I have explained to several of you the necessity to move other freight in order to pay our bills and more importantly—pay your wages (one of our more significant bills is our monthly truck payment). Switching from dedicated lanes to outside freight is not an easy task. For those of you who have supported this effort—I say again thank you.

Greene testified that this letter was placed in the paychecks of all the drivers; that he gave the letter to the payroll clerk, Kari Moss, to send out; but that he did not observe Moss sending it out. Counsel for General Counsel objected to the receipt into evidence of this letter correctly pointing out that the drivers who testified at the trial herein testified that they had never received this letter. Also counsel for General Counsel argued that there is no evidence that the letter was in fact distributed to the drivers, and no driver testified that he received this letter or spoke to Greene specifically about the letter. I ruled as follows:

> I'm going to receive Respondent's [Exhibit] 1 to the extent [of] this witness' testimony that he drafted it an then he turned [it] over to a payroll clerk, Kari Moss, for distribution, [and] that he has no personal knowledge as to whether it was in fact distributed to all the drivers.

Notwithstanding this limitation on the receipt of this document, the Respondent did not subsequently call Kari Moss as a witness to testify that she had in fact been given this document to distribute to the involved drivers and that she did in fact distribute this document to the drivers who testified at the trial that this letter was not distributed to them. On cross-examination Greene testified that nowhere in Respondent's Exhibit 1 did he inform drivers that they could be terminated for refusing broker loads.

The Respondent's truckdriver, Leslie McCall, testified that he had a discussion with another of the Respondent's drivers about the fact that the Respondent had done away with the $12-an hour detention pay drivers received from the Respondent for every hour after the first hour they had to wait for a pickup. The other driver invited McCall to a union meeting to be held on January 20.

On January 20, a meeting was held at the union local hall in Gary, Indiana. The meeting was arranged by Larry Regan, a business agent organizer of the Union, at the behest of the Respondent's drivers Stallings and Larry Whitehead. Approximately 20 of the Respondent's drivers were in attendance. They signed a petition, General Counsel's Exhibit 12, which reads as follows: "We the undersigned hereby declare that in order to achieve fairness on the job, we authorize the Teamsters Union Local No. 142 to represent us for the purpose of Collective Bargaining." They also signed General Counsel's Exhibit 13, which is "An Open Letter To The Management" of the Respondent indicating that "[a]s members of the Union Committee, we know our rights to organize" and "[w]e expect the Company to respect those rights." The employees who attended the meeting were given union buttons, union bumper stickers and union authorization cards to give to other employees. McCall testified that he attended this meeting and he signed both of the above-described documents; and that he wore his union button every day until he was fired.

Dennis Rice, who drove a truck for the Respondent between the Chrysler plant in Kenosha and Detroit, Illinois, and Ohio, attended the January 20 meeting. He signed the above-described petition and organizing committee letter. Also, Rice took a union button and wore it on his jacket while he was at work, and he solicited two drivers to sign union authorization cards but both told him they had signed. On cross-examination Rice testified that no manager or supervisor ever saw him wearing a union button and no supervisor or manager ever spoke to him about the union organizing campaign.

Alfred Hester was a truckdriver for the Respondent in its Chrysler operation from June 11, 1999, until March 31. He attended the above-described January 20 union meeting, and he signed the above-described petition and union organizing committee notice letter.

Madonna Bigheart was a truckdriver for the Respondent in its Chrysler operation from November 1999 until January 26.

[2] Chester Stallings, Madonna Bigheart, Leslie McCall, Greg Strigins, and John Brooks were specifically named by Greene who then indicated "just about every driver." (Tr. 412.)

She attended the above-described January 20 union meeting, and she signed the above-described petition and union organizing committee notice letter. Bigheart also received a union button and she put it on her purse which she had with her when she went to work.

Whitehead, who was a truckdriver in the Respondent's Chrysler operation from July 1999 until March 31, attended the January 20 union meeting, and he signed the above-described petition and the notice to the Respondent regarding the employees on the organizing committee. Whitehead received a union button and he wore it every day to work. From January 2000 until he was terminated, Whitehead was assigned a dedicated run from Belvidere to Toledo.

Stallings, who was a truck driver in the Respondent's Chrysler operation from April 1999 until March 30, attended the January 20 union meeting where he signed the above-described petition and notice to the Respondent regarding the employees on the organizing committee. At the end of the meeting he took union authorization cards and subsequently he had 17 of the drivers who did not attend the meeting sign the cards.[3] Stallings also received a union button at the meeting and he wore it every day. He drove a dedicated run from Chrysler at Belvedere to Toledo.

Greene testified that he was first made aware of a potential union organizing drive on a Monday in the mid-January 2001 when Gray telephoned him and told him that she had been told by some of the drivers that a meeting had been held over the weekend to discuss the possibility of organizing for a union. He relayed this information to Berman that same day. Green also testified that Koehler had told him on the Friday before that she had been told by drivers that they were going to have a meeting and he relayed this information to Berman but when Berman asked he was unable to tell him what the meeting was about. Greene told Koehler that to tell any driver who brought it up that if the drivers were going to meet, they were not to use the company trucks to do so.

On Monday January 22 Stallings was in Kenosha and he telephoned Koehler for his evening dispatch. Koehler told him that Greene wanted to speak with him. Stallings testified that Greene asked him 'what's going on' and he asked Greene what he meant; that Greene then said "'I heard that you all going [sic] Union and that if you go Union that they would have to ask Chrysler for some more money and Chrysler wouldn't give it to them.' Chrysler already wanted them to go 18 percent lower on the contract and that, you know, they would be, they would have to close the doors" (Tr. 338); that he telephoned Regan and told him what Greene said; and that Regan told him that he was going to file charges because it was illegal for Greene to say that the Respondent was going to shut the doors. Greene testified that this telephone conversation "was very similar to what Mr. Stallings indicated." (Tr. 423.) Further, Greene testified:

> I asked him what was going on. He said, what do you mean? And I said, I understand that some of the drivers are in the process of organizing a union. And he said, yes we are. And I said, can you tell me what's going on? And he proceeded to tell me, using quite a few expletives, that he felt that the company wasn't doing certain things for them.
>
> I said, well, you got to do what you got to do. And the conversation was probably less than 30 seconds. [Tr. 423 and 424.]

Greene also testified that this was all that was said in this conversation, and he never had any other conversations with Stallings about the union organizing.

On January 23, Regan had a grievance and negotiation meeting with the Vice President of Labor Relations for Active U.S.A. Todd Barnum, which Regan testified was a branch of Dallas and Mavis. Regan testified that at that time he knew that he had a majority of the drivers in the Chrysler operation because he had been given additional union authorization cards, and he asked Barnum for voluntary recognition; and that Barnum told him that he would have to bring this up with Berman, who was then the president of operations for Dallas and Mavis Specialized Carriers, first and then down the road he, Barnum, probably would be assigned to negotiate the contracts. Berman testified that Active USA provides the drivers for the Respondent's dedicated operation for the Ford Motor Company; that Active USA is a motor carrier that is a subsidiary of the holding company called JHT Holdings; that Dallas & Mavis is a subsidiary of JHT Holdings; that Barnum does not work for Dallas & Mavis; and that Barnum is the vice president of labor for Active USA.

On January 23 or 24, according to the testimony of Greene, he had a meeting with Brooks. Greene testified as follows about this meeting:

> I believe it was Tuesday or Wednesday of that week, Mr. Brooks came in and basically just told me that some of the drivers were talking about forming a union and that Chester Stallings was the leader and that he was not interested in joining the union. That was the conversation we had. [Tr. 424.]

On cross-examination Greene testified that on January 23 or 24 Brooks walked into his office and asked him if he heard what was going on and he told Brooks "no, I hadn't really heard a lot about it" (Tr. 437); that at the time he had been told by two dispatchers that the drivers were attempting to organize and he had already had his conversation with Stallings; that Brooks told him that he had been approached to sign a union card and he refused, he was not going to join the union; and that Brooks told him that it was Stallings who approached him to sign a union card and Stallings was the ring leader. As noted above, Brooks signed a union authorization card on January 21. And as noted below, Greene was given copies of the signed union authorization cards to look at when the Union sought recognition from the Respondent.

[3] On January 21 Stallings witnessed truckdriver Brooks sign the union authorization card he had given him. GC Exh. 25. Stallings testified that he gave Brooks a union button which he put on his shirt, and he gave Brooks a union bumper sticker; and that when he subsequently saw Brooks at the Steel City truck stop in Gary, Indiana, Brooks was always wearing his union button.

On January 24 Regan telephoned Berman and told him that a majority of the involved employees had memorialized their support for the Union. Regan asked Berman for voluntary recognition. Berman said that he was in negotiations with Chrysler, which was seeking reductions from the Respondent, and the negotiations were not going very well. Berman asked Regan to bear with him and he would get back to him. Regan testified that during this conversation Berman told him that he was aware of the union organizing campaign.

On January 24, Bigheart was waiting in the parking lot at the Respondent's Kenosha office to pick up her paycheck. Dispatcher Lexer came up to her truck and told her that he had heard that the drivers were going into the Union. When Bigheart replied that they were trying, Lexer said "well, I'm staying away from that . . . I have enough problems to take care of." (Tr. 276.)

On January 24, while he was returning from Toledo, Whitehead received a Qualcom message, which was an e-mail type system installed in the trucks, from Koehler asking him if he wanted to take a broker load going to Florida. Whitehead sent a Qualcom message to Koehler indicating that he did not have the travel money to go to Florida. Koehler did not respond. Whitehead testified that he was not disciplined for refusing to take this broker load; and that he was never informed that refusal to take broker loads was grounds for discipline or termination. About 6 p.m. he telephoned Gray to find out if she had any local runs since he did not have any money, and she told him to call in on Friday morning January 26.

According to the testimony of Greene, on January 24 or 25 Berman changed the paycheck policy. Greene testified that he met with Berman on January 24 and they discussed the fact that the Respondent had just lost its receptionist at the Kenosha office;[4] that before this the drivers' paychecks were given to the receptionist downstairs at the Kenosha office and she would have the drivers sign for their paychecks; that it was decided that checks would be mailed to the drivers because they did not want the drivers walking up the steps into the company area, which was against company policy; and that the only reason that the Respondent changed its paycheck policy on January 24 is because it had lost its receptionist. The receptionist worked from 7:30 a.m. until 4:30 p.m. and in the past if the receptionist was not at her desk, according to Greene, the driver could contact the dispatcher and have the dispatcher bring down their paycheck. On January 24 Gray, at the direction of Greene, sent a Qualcom message to all drivers informing them of the new paycheck policy and indicating that if they wanted the paycheck the next day the driver could pay $7.50 and they would be mailed overnight. No reason was given to the drivers for this change in policy which had existed from when the involved Chrysler division officially opened on April 16, 1999. McCall testified that before the union organizing campaign he would go to the Respondent's Kenosha office on Wednesdays after 9 a.m. and get his paycheck from the receptionist; that if the receptionist was not there when he went to pickup his paycheck, he would get it from the third shift dispatcher; and that during the union campaign he received a memorandum indicating that drivers were no longer allowed to pick up their paycheck at the Respondent's Kenosha office, the checks would be mailed, and the drivers could pay $7.50 if they wanted next day delivery. Rice testified that in the past he received his paycheck from the receptionist in the Respondent's Kenosha's office; that when the receptionist was not present for some reason, sometimes he was allowed to go up to the dispatcher's office or the dispatcher would toss it out of the window to him; and that after the organizing campaign commenced he received a letter from Greene on January 24 indicating that the paycheck would be mailed to his home, and no reason was given for the change in policy. Bigheart testified that before the union organizing drive she was able to pick up her paycheck from the receptionist or from a dispatcher if it was after hours; and that after the organizing drive commenced she received a Qualcom message and a letter indicating that the paychecks would be mailed or if the driver wanted overnight, the driver would have to pay $7.50. When called by the Respondent, Greene testified that the paycheck policy was changed again a couple of days later but this change was not done in writing; that he told Berman about the drivers complaining that the mailing policy was causing them a hardship since they had bills to pay and they needed to receive their paychecks right away; that this subsequent change was communicated primarily to the drivers by the dispatchers telling them that they could come back and pick up their checks; and that the drivers were able to pick up their checks until the closing in March 2001.

On January 25, according to the testimony of Regan, he received telephone calls from Stallings and Whitehead "basically concerning . . . threats of closure" (Tr. 120). He advised the employees that he would file unfair labor practice charges against the Respondent.

On January 25 at about 11 a.m. McCall called the Respondent's Kenosha office to ask for a load. Dispatcher Koehler told him that she had a Jeep Toledo going out at 7 p.m. and he said that he did not want to take it. Koehler then said that she had an "11 o'clock" (apparently p.m.) Sterling Heights, he told her that he would take the 7 p.m. load for Jeep in Toledo, and she assigned the load to him. McCall testified that Koehler let him pick the load he wanted. McCall picked up the load at about 7 p.m. and at about midnight that night the left front tire on his tractor went flat in Jamestown, Indiana. McCall contacted dispatcher Lexer and Ryder was sent out to change the flat.

At about 11 p.m. on January 25 Rice spoke with Gray from his home. She asked him if he had a load that was coming back to Racine and he told her that he did. Gray told Rice that she had a load going from Racine, Wisconsin to New York and she was putting him on it. Rice testified that he did not agree to take the load from Racine. He did not testify that he refused the load at that time.

The following day, January 26, Rice advised dispatcher Koehler that he was not going to take the New York load because the Respondent was not going to pay him for the detention or layover, and dispatcher Koehler would not give him a cash advance for food and other things on the trip. After Rice dropped off his load in Kenosha on January 26 he went to a local parking lot to get some sleep. Rice saw McCall's truck,

[4] Greene thought that this was a downsizing decision.

he woke him up, and they went and got something to eat. When Rice returned to his truck he saw the Qualcom message from Gray which indicated that rejecting loads would not be tolerated and he should clean out his truck and take it to Racine. Rice testified that he understood this message to mean that he as fired. Rice told McCall who then telephoned the Respondent's Kenosha office. Subsequently McCall told him that he had just been fired for turning down the trip to New York. Rice testified that before he was fired the Respondent gave drivers a choice regarding whether they wanted to take broker loads; and that he was allowed to refuse to take a broker load in the past and he was not told that he would be disciplined or that it was grounds for termination. On cross-examination Rice testified that, with respect to the New York broker load, he told Gray that he did not drive on Sundays and he did not run to the east coast. On redirect Rice testified that he never received anything in writing from the Respondent informing him that handling broker loads was mandatory. Rice was hired in May 2000 as a driver of Chrysler products. Typically he worked 12 hours a day.

On Friday, January 26, at about 2 a.m. when McCall reached the Ohio state line he telephoned dispatcher Lexer, told him that he was rolling, and asked him if he had any loads out of Toledo. Lexer told McCall that he had two or three loads going up to New York and Lexer asked him if he wanted one. When he declined, Lexer told him not to worry about it. At about 4 a.m., after his trailer was emptied at Jeep in Toledo, Ohio, McCall called Lexer and indicated that he needed a load. Lexer told McCall to pick up a load at Excel and deliver it in Kenosha at 2 p.m. that day. On his way back to Kenosha, at about 7 a.m., McCall received a message on his Qualcom in the truck indicating that Koehler had a load to New York from Racine, Wisconsin, and asking him if he wanted it. Using Qualcom, McCall advised Koehler that he did not have the hours to handle the load. Koehler then sent him Qualcoms indicating that he should bring his log book to Respondent's Kenosha office because the bosses wanted to look at it. McCall delivered his load in Kenosha between 10 a.m. and 12 p.m. At that point he had been awake and working for 17 hours straight. McCall drove to a parking lot and went to sleep. At about 3 or 4 p.m. another of the Respondent's drivers, Dennis Rice, as noted above, knocked on his truck door and woke him up. They went to get something to eat. McCall testified that Rice said that he might be getting fired for not taking a load to New York; and that when they returned to Rice's truck he had a Qualcom message from dispatcher Gray indicating that he was fired. Shortly after this, McCall telephoned dispatcher Gray to get a load for Monday, which was his normal practice. She told him that she had a load going to New York from Racine, Wisconsin. He told Gray that he did not want it. She asked him if he was going to get the New York load. He said he was not and he asked her if he did not get the load, was he fired. Gray responded "yes," and she told him to clean out his truck and take it to Ryder in Racine and drop it off. McCall testified that he told Gray that "I already did four turns [and] I didn't have no more [DOT driving] hours"; that Gray wanted this non-Chrysler, broker load picked up in Racine immediately; that before January 26 the involved drivers did not have to take broker loads, and this is what he was told when he was hired; that before January 26 he had never been informed by a supervisor or a dispatcher that refusal to take a broker load was grounds for discipline or termination; and that he had never been informed of this in writing or on the Qualcom. Also, McCall testified that the Respondent knew how many hours he had worked that week since it was in the Respondent's computer; and that if he drove over the number of hours allowed by DOT he could be personally liable for a stiff fine.

Between 3 and 4 a.m. on January 26, Whitehead telephoned Lexer and asked him if he had any local loads that morning. Lexer told him that he did not have any local loads but he did have a broker load to Baltimore and New York. Whitehead told Lexer that he had already told Koehler that he did not have enough money to go to Florida, he could not go to Baltimore, and he wanted Lexer to take his name off the list. Whitehead was not disciplined for refusing a broker load and he was not informed that refusing a broker load was grounds for discipline and termination. He testified that when the Respondent started handling broker loads the drivers volunteered to take them.

On the morning of January 26, Stallings telephoned Koehler from a truck stop in Gary, Indiana, to get a load. Koehler told him that she had a broker load to New York and he refused it without giving a reason. Koehler did not tell him that the refusal of a broker load would be grounds for discipline or termination. Stallings testified that before the union organizing drive it was the Respondent's policy that broker loads were not mandatory; that when he was hired Greene and Donnie Harold, who "was above Greene," told him that he was dedicated to Chrysler only; that and he had refused broker loads to Florida and Pennsylvania offered to him by Koehler in November and December 2000; that he did not give a reason for refusing the loads; and that he was not told that refusing a broker load was grounds for discipline or termination.

McCall testified that he began working for the Respondent on October 18, 2000; that normally he handled four turns a week, namely transporting Chrysler engines from Kenosha to Detroit and returning with empty trailers, empty engine racks, or sometimes defective engines on the racks; that typically he worked 17 hours a day; that he considered the three dispatchers to be his supervisors; that the Respondent had a computer program in which the dispatchers entered his miles and they knew how many miles he drove in a week; that he wore a union button from the time he received it on January 20 until he was fired; and that he wore the union button to the Respondent's Kenosha office when he picked up checks. On cross-examination McCall testified that no manager or supervisor ever saw him wearing the union button or ever spoke to him about the union organizing campaign; and that he did not drop off his log as requested on January 26. On redirect McCall testified that he did not bring his log to the Respondent's office on January 26 because the Respondent already knew how many turns he had done that week and the information was in the Respondent's computer; and that he went to the Respondent's Kenosha office on Wednesday, January 24, to pick up his paycheck from Sharon the receptionist and he was wearing his union button at the time.

At about 10 a.m., on Friday, January 26, Bigheart, while she was driving in Michigan on her way back to Kenosha on her third and final turn that week, received a Qualcom message from Koehler asking her if she wanted to take a broker load to New York. Bigheart advised Koehler that she did not want to take the load. Koehler sent a second message indicating the Bigheart had to stop and telephone Greene. She did. Greene asked her why she turned down the New York load and she told him that she had worked all week long and she had made plans weeks earlier to be with her family. Bigheart testified that Greene said that the load was to be picked up in Racine that afternoon and it was not supposed to be delivered until Monday; and that when she refused it a second time Greene told her to clean out her truck, which meant she was fired. Bigheart estimated that it would take about 12 to 13 hours of driving time from her home in Portage, Indiana, to New York. She testified that when she was hired dispatchers Gray and Koehler told her that taking broker loads was not mandatory, and in the past she had refused broker loads from both Gray and Koehler and she had never been told before the union organizing drive that she would be disciplined or terminated for refusing a broker load or that such refusal was a violation of company policy; and that during her employment at the company she had never received anything in writing letting her know that broker loads were mandatory. On cross-examination, Bigheart testified that she did not tell Greene that she was out of DOT hours. Subsequently she testified that Greene told her that she could pick up the load, hold it over the weekend, and make the delivery on Monday; and that she did not tell Greene that she did not have enough hours to pick up the load and bring it to her house.

According to Greene's testimony, broker loads were any loads other than Chrysler loads. Such loads were not limited to return loads to Kenosha, and the driver could go anywhere in the continental United States as opposed to handling Chrysler loads in Wisconsin, Illinois, Ohio, Michigan, and Indiana. Greene testified that there was never any written rule that drivers had to accept broker loads; that he alone decided to terminate driver McCall on January 26 for refusing a brokered load to New York; that he did not recall the date when the involved brokered load was supposed to be picked up; that before he decided to terminate McCall he considered McCall's overall work record and he spoke to Gray about McCall; that he was not aware of any prior written discipline to McCall; that McCall might have refused a broker load in the past but he would not know if this occurred with McCall because the dispatchers do not discuss every load with him; that Gray told him that she had accepted a broker load to be moved and McCall was refusing the load; that Gray told him why McCall was refusing the load and "in my mind it was not a satisfactory reason for not accepting the load"; that he believed that McCall told Gray that he did not have enough hours under the United States Department of Transportation (DOT) regulations to haul the load; that he requested that McCall bring in his records so that he could determine whether McCall in fact did not have enough hours; that he would not have been able to obtain this information on the TMW software system; that he decided to terminate Rice on January 26 because he refused the same brokered New York load saying, according to what Gray told him, that he did not work on weekends because he wanted to spend time with his children; that while Rice had refused loads on Thursdays, Fridays, and weekends in the past but he did not terminate Rice in the past; that some of the loads that Rice refused in the past were Chrysler loads and the remainder were broker loads; that he decided to terminate Bigheart on January 26 when Koehler told him that Bigheart was refusing the same broker load to New York; that Bigheart told him that she would not take the load because she had made plans to be with her family for the weekend and she did not want to take the load; that he told Bigheart that she could pick the load up and take it home and let it sit over the weekend and depart on Sunday for a Monday delivery; that the broker New York load was a load of salt to be picked up in Racine, Wisconsin; that the load was supposed to be picked up on January 26, before the company closed; that he was not sure of when it had to be delivered on Monday, January 29, in New York; that he did not know the mileage between Racine and New York; that under DOT regulations a driver can drive a maximum of 10 hours consecutively and then the driver has to take an 8-hour break; that also under DOT regulations a driver is not to drive more than 70 hours within a 8-day period; that if a driver fails to abide by these regulations the driver can be ticketed, suspended, or terminated; that Bigheart did not tell him that she was out of hours for the rest of the week; that he did not investigate to determine how many hours Bigheart had worked that week but he did consider her overall job performance; that 600 miles a day is average for a driver and considering that the driving day is 10 hours, this would mean that the average is 60 miles an hour; that in the past Bigheart had told him that she wanted to drive as much as possible because she needed the money and she had taken a high number of loads in the past including broker loads; that prior to the involved broker New York load Bigheart, to his knowledge, had never refused a load, she did not miss many days of work, and she had no prior written disciplinary record; that he thought that Bigheart lived in the Gary, Indiana area; that when he offered the same broker New York load to Bigheart, McCall and Rice he did not know where they were at the time; that he did not know of any driver being terminated before January 26 for refusing a broker load; and that other drivers have been terminated for refusing to take Chrysler loads, General Counsel's Exhibits, 4, 6, and 7.[5] Greene did not testify that he cited any written policy to the drivers who refused the involved New York load indicating that the handling of broker loads was mandatory.

When called by the Respondent, Greene testified that the Respondent does not have a written policy with respect to drivers refusing broker loads; that a lot of drivers were able to refuse broker loads without any punishment because before there was enough business to cover the Respondent's costs and expenses; that in the November 2000 through the end of January 2001 time frame the Respondent lost some of the dedicated lanes that it had from Chrysler due to shutdowns; that the Respondent had

[5] While the driver referred to in GC Exh. 5 was initially assigned a Chrysler load, the termination letter indicates that his termination was due to his failure to contact the dispatch office, and a lack of communication.

to supplement its revenue by finding other freight; that while the involved drivers originally had the option to choose whether to handle broker loads because the Respondent had available freight, as the freight started drying up he and Berman told the dispatchers that they were to tell the drivers if they did not want to handle a load, they could turn in their truck; and that this had been the Respondent's policy since July 2000 when Chrysler started to shut down the plants. Greene testified that while the computer TMW system records the miles of a load the system it does not show the on duty driving hours that a driver has and only the log would show that.

On January 26, Regan received telephone calls from Bigheart, Rice, and McCall informing him that they had been terminated by the Respondent for refusing to haul a broker load. Regan testified that some of these employees told him that they were out of hours and did not have funds on them to pay for food on the trip; and that he told these employees that he would be filing charges for them. Later that day Berman telephoned Regan. Regan put the call on the speaker phone so that another Business Agent Steve Parks could hear. Regan testified that he and Berman discussed voluntary recognition, and he told Berman that he had filed unfair labor practice charges, and he was about to file additional charges regarding the three discharges; that he asked Berman why the Respondent had fired the three drivers and Berman told him that they refused work; that he told Berman that the Respondent had never done that in the past; that he discussed the fact that the Respondent had altered that the method of pay, and Berman told him that he would look into the paycheck situation; that Berman told him that the Respondent had lost an office staff person who was responsible for issuing paychecks downstairs; that Berman told him that he was still in negotiations with Chrysler and Berman asked if the Union was willing to take a reduction; and that Berman told him that he would get back to him on January 29 regarding voluntary recognition.

On Sunday, January 28, Stallings, pursuant to an invitation which was given to him by Koehler, attended a breakfast meeting at a restaurant. He was one of four drivers present. Berman, Greene, Koehler, and Lexer were also present. The drivers were advised that Chrysler wanted the Respondent to rebid on the involved contract and Chrysler wanted the bid reduced by 18 percent. Stallings brought up broker loads indicating that drivers did not have the money to go on long runs, and if the Respondent let the drivers have a $100 advance, it would not have any problems with broker loads. Berman and Greene agreed. But since Chrysler movements increased, the drivers did not handle any more broker loads.

Brooks was terminated on January 30. Greene testified that Berman made the decision; that he met with Berman and told him that Brooks was a good driver and he did not want to terminate him; that Berman said that there were some issues with the insurance company and Brooks was one of the drivers who had to be terminated; that Brooks was the only driver in the Chrysler division who was terminated but there were other drivers in the company who were terminated at this time; that Brooks was terminated because he was outside of the insurance standards; that the Respondent had the same insurer for the two years it was in Kenosha; that he first became aware that Brooks was outside the insurance standard in December 2000; that the report, General Counsel's Exhibit 10, listed all of Brooks driving violations but it did not indicate what action had to be taken with regard to Brooks;[6] that he was aware of Brooks driving record before he received the report; that as indicated in General Counsel's Exhibit 8, Brooks was advised by letter on March 1, 2000, that his "driving record had fallen outside our insurance guidelines" and if during the next 6 months he was "convicted of another moving violation or [was] involved in a preventable accident, [his] qualification as a Dallas Mavis driver will be terminated"; that page 2 of General Counsel's Exhibit 8, which is a "PROBATION STATUS" indicates that Brooks was placed on 6 months' probation beginning on March 1, 2000, because "Exceeds company insuring requirements (traffic violations)"; that after Brooks was placed on probation he did not receive another violation and he was retained after his probationary period ended; that in March 2000 the Respondent did not receive something from its insurer indicating that Brooks was outside the guidelines but rather Ryder, from whom the Respondent leases tractors, indicated that his driving record was not good enough for him to be driving their tractor; that Ryder agreed to let Brooks continue to drive their tractor if he was placed on probation and he was successful in getting one of his violations removed from his record; that the tickets that Brooks received in 1998 and in January 1999 were received before he started working for the Respondent; that on March 1, 2000, Debra Lewis, who drove for the Respondent in its Chrysler division, received the same letter as Brooks, General Counsel's Exhibit 9; that Lewis was terminated in September 2000 after her probation ended when she received another speeding ticket; that he was not informed about any other driver in the Chrysler division being outside the insurance guidelines; that according to the report from the Respondent's insurer, General Counsel's Exhibit 10, Respondent's driver Robert Brueckner, who was hired by the Respondent in 1997 and who did not work in the Chrysler division, was outside the insurable standards in that he had a total of six violations in 1998 and 1999, it was recommended by an outside safety compliance manager utilized by the Respondent that he be terminated, he was placed on probation, and he violated the terms of the probation with no consequences; and that he did not know whether Brueckner was still working for the Respondent. Subsequently, Greene testified that the Respondent terminated Debra Lewis in

[6] As here pertinent the report reads as follows:

Brooks, John		Hire Date: 05/19/99
		MVR Date: 09/13/00
		Status: Active-DMSCC
09/28/98	-	Operating without being licensed
11/16/98	-	Driving when license is suspended
11/16/98	-	Failure to yield right of way
01/19/99	-	License suspension for accumulation of violations. Privileges reinstated on 07/19/99
07/02/99	-	Speeding
10/08/99	-	Speeding

Mr. Brooks is on a six month probation—an MVR is being ordered once per month.

MVR (07/21/99) indicates that Mr. Brooks was hired while license was suspended for DUI.

October 2000 when her driver's license was revoked and she could not drive for the Respondent. General Counsel's Exhibit 24. Lewis had been placed on the aforementioned probation by the Respondent in March 2000 after Ryder sent a letter to the Respondent indicating that her driving record placed her outside of their standards.

Berman testified that Brooks first came to his attention in the summer of 2000 when the Respondent received an audit from its insurance company and Brooks was on their list of drivers who fell below their standards for employment; and that he told Greene to terminate Brooks but Greene felt that Brooks was a productive driver and he did not want to terminate him. On cross-examination, Berman testified that he did not believe that Brooks was terminated in the summer of 2000; that General Counsel's Exhibit 10 is the only thing that the Respondent received from its insurer, as here pertinent, and it does not recommend that Brooks be terminated; that it was the Respondent's decision to terminate Brooks based on the guidelines set forth by the insurer; that he believed that one other driver, Lewis, was terminated because of her driving record; and that he did not know that Lewis was terminated because she lost her commercial driver's license.

According to the fax transmission cover sheet and record sheet, General Counsel's Exhibit 14, the Union faxed the sheet with names of the involved employees who were on the Union organizing committee on January 30 to Berman at the Respondent's Kenosha office. The certified mail documents included in this exhibit indicate that the Union also mailed something to Darrell Greene on January 30. Regan testified that the certified mail in question was a hard copy of the document which was faxed on January 30 to Berman. Greene testified that he first saw General Counsel's Exhibit 14 on January 30.

On direct Hester gave the following testimony about a telephone conversation he allegedly had with Gray in late January 2001 when he telephoned Gray for a load:

> [A]nd once I got the dispatch, she [Gray] asked me a question I think, are you, you guys are forming a union? And she made a statement that the company is not going to let this happen if you guys do this, I mean, they're not going to let us tell them how to run this company . . . . [or] what to do.
>
> Q. When she asked you if you were bringing in the union, what was your response?
>
> A. I said I hope that it wouldn't happen.
>
> . . . .
>
> Q. Can you repeat to me again what was said during the telephone conversation?
>
> . . . .
>
> MR. HESTER: Okay, I called in for dispatch as I do every day. And once I got my dispatch, she [Gray] made a statement that she heard that we were forming a union and she said to me that this company is not going to let you guys run this company and tell them what to do.
>
> . . . .
>
> Q. Do you recall if she said anything else during the conversations?
>
> A. That's it. That's all. My next words was [sic] I hope this wouldn't happen to us.
>
> Q. What wouldn't happen to you?
>
> A. That they would close the company up.
>
> Q. Had she made any comment about that possibility?
>
> A. Right, she did.
>
> Q. What did she say specifically?
>
> A. Well, then, they might just close the company down, that's all she said in her statement.
>
> Q. And did she say why they might close down the company?
>
> A. She didn't say why, no, other than the union.
>
> Q. So, she said that they were going to close down the company if the union came in?
>
> A. Right.
>
> ADMINISTRATIVE LAW JUDGE WEST: What exactly, not verbatim, what we're interested in is what she said.
>
> MR. HESTER: Okay.
>
> ADMINISTRATIVE LAW JUDGE WEST: All right. Again, from the beginning to the end. You called in asking for a dispatch. She gave you a dispatch. What was then said by Denise Gray?
>
> MR. HESTER: I heard you guys were forming a union.
>
> ADMINISTRATIVE LAW JUDGE WEST: Keep going.
>
> MR. HESTER: Okay. And then, she made a statement that this company is not going to let you guys run this company and tell them what to do.
>
> ADMINISTRATIVE LAW JUDGE WEST: Keep going.
>
> MR. HESTER: And I made a statement to her, I hoped that wouldn't happen after she made the statement, I'm getting confused here but she made the statement that this company, they would probably close the company up if we did that. And I said to her hope that didn't happen. [Tr. 254-256.]

On February 8, Regan telephoned the Respondent's attorney, John Holmquist, about voluntary recognition and Holmquist told him to contact Greene.

Greene testified that he signed McCall's termination letter, Respondent's Exhibit 2, which is dated February 9; that he believed that Gray drafted the letter; and that the normal procedure is to send such a letter with the driver's paycheck, he could not say for sure how it was done, but "I signed it and gave it back to the dispatchers to be mailed to the drivers." (Tr. 426.) Counsel for General Counsel objected to the receipt into evidence of the letter indicating that while he did not object to the fact that Greene signed the letter and gave it to the dispatcher, he did object to any inference that the letter was in fact mailed to McCall in view of McCall's testimony at the trial herein that he had no personal knowledge of the letter. Counsel for General Counsel's objection was sustained. The receipt of the Exhibit was limited to the fact that Greene signed this letter and he gave it to a dispatcher.

On February 15, Regan sent Stallings to Greene with proof of the majority consisting of the above-described petition and copies of the signed union authorization cards. Stallings arrived at the Kenosha office around 2 p.m. He waited 3 hours to see Greene, whom he was told was in a meeting. Greene reviewed the petition and the copies of the cards but he would not sign the recognition agreement. Stallings telephoned Regan and told him what was occurring. Regan told Stallings that it did not matter that Greene refused to sign the recognition agreement because just looking at the petition and the copies of the cards were good enough, and Regan was going to telephone the Respondent's lawyer, John Holmquist. Greene then tried to call the Respondent's attorney. Stallings left the Respondent's Kenosha facility and went to the Chrysler facility about one half a mile away to get some sleep. While Stallings was at Chrysler he received a Qualcom message indicating that Greene wanted to see him back at the Respondent's Kenosha facility. Stallings went to see Greene who then signed the recognition agreement. Later that day Stallings brought Regan the signed recognition agreement, General Counsel's Exhibit 15.

On February 20, the Union sent a letter, General Counsel' Exhibit 16, to Barnum in Kenosha indicating the Union's desire to enter into negotiations for a collective-bargaining agreement. Subsequently, Regan was advised that Berman and not Barnum would be handling the negotiations.

On March 1, the Union sent a letter to Berman, General Counsel's Exhibit 17, indicating its desire to enter into negotiations relative to a collective-bargaining agreement.

On March 8, Berman telephoned Regan and they agreed to have a bargaining session on March 16.

On March 16, there was a meeting between Regan, and negotiating committee members Stallings and Whitehead on the one hand, and on the other hand, Berman. The union presented its proposed collective-bargaining agreement (GC Exh. 18). The Respondent did not have a proposed collective-bargaining agreement at this time. The parties went through the noneconomic issues of the Union's proposal. They then agreed on a wage rate of 40 cents a mile, and, according to the testimony of Regan and Stallings, Berman wanted to condition that on a driver not having any occurrences (violations or accidents). Health insurance, pensions, pay for jury duty, detention pay, and vacations were discussed. Berman told Regan and the others that he was going to try to adjust his bid to Chrysler based on the Union's fair proposal and he was going to try to get Ryder to lower its rate. Stallings testified that Berman said that Chrysler wanted the Respondent to lower its bid by 18 percent but the Respondent could not do it. Berman indicated that he would get back to Regan on March 26. Berman testified that at this meeting they reviewed the Union's proposal and basically there was agreement on the noneconomic issues; that he advised the Union that Chrysler had asked the Respondent to reduce its costs between 15 and 18 percent and he had approached Ryder requesting a dramatic reduction in the monthly cost; that a wage rate of 40 cents a mile was agreed on and he indicated that acceptance of that wage rate was contingent on Ryder reducing the equipment cost and Chrysler allowing the Respondent to maintain the existing rate; and that the mileage rate was not based on driver's performance or safety records.

On March 26, Regan telephoned Berman and was told by a secretary that Berman was still in negotiations with Chrysler.

On March 28 Whitehead received a Qualcom message from Gray asking him if he was going to turn in his truck in South Bend. Whitehead telephoned Gray and asked her what was going on. She told him that the license plates were going to expire on March 31.

On March 29, Regan and Berman talked by telephone. Berman informed Regan that the Respondent lost the involved Chrysler account. Regan said that he wanted to get back to the table to negotiate for the more senior people and negotiate the effects of the closure if the Respondent was going to close.

On March 29, Stallings telephoned Koehler to tell her that he could not handle the Belvidere run on March 30 because he had another negotiating meeting to attend. Koehler told him to turn in his truck. He told her that such a message would have to come from Berman or Greene. Greene then got on the telephone and told him to turn in his truck because it was over. Stallings testified that he understood Greene to mean that they no longer had the Chrysler account and the Respondent was closing the doors.

On March 30, Regan, Stallings, Whitehead, and driver Craig Heart met with Berman. Regan proposed retaining some of the more senior drivers to handle broker loads. He requested that the drivers receive their vacation pay, and he requested a seniority list. Regan also requested that the drivers who were to be laid off receive 2 months of severance plus 2 months of health insurance. According to the testimony of Regan, Berman indicated that he did not believe that he could do that, Regan asked for a counterproposal, and Berman said that he would look into the broker loads. Whitehead testified that Berman never notified the Union that he thought that the parties were at impasse, and the Respondent did not communicate further about broker loads, severance pay or benefits. Stallings testified that Berman was going to get back to the Union; that this turned out to be the last bargaining session; and that to his knowledge the Respondent did not meet with the Union to discuss broker loads or a severance package. Berman testified that he indicated that the Respondent was ceasing operations immediately; that Regan felt that the Respondent could keep the involved drivers in the system and he told Regan that he did not believe that it could be done; that Regan brought up severance, holiday pay, vacation pay, and insurance coverage; that Regan asked for a seniority list; and that he told the Union representatives that he would get back to them in a few days.

Whitehead testified that on March 31 he received a letter, dated March 28 (GC Exh. 22), from Berman informing him that the Respondent no longer had the Chrysler business, the "Chrysler operation will be eliminated within the next few days," the operation would close March 31, and his position would be terminated at that time.

On April 2, Regan received a seniority list from the Respondent (GC Exh. 19).

Also on April 2, Stallings received a letter from the Respondent informing him that it had lost the Chrysler account and that he was no longer employed by the Respondent.

On April 3, Berman faxed and sent Regan the following letter (GC Exh. 20):

> This letter is to follow up with respect to our recent meeting, this past Friday in Chicago, IL. As you are aware, Dallas & Mavis Specialized Carrier Co. LLC. ceased operating the Chrysler Division due to the loss of business based on our inability to meet Daimler/Chrysler's price reduction initiative. The termination of services was effective on 3/31/01 and therefore all drivers were terminated as of this date. Furthermore, the agreement between Dallas & Mavis and Ryder Transportation whom provided the equipment for this operation did not renew the appropriate licenses and therefore all equipment has been returned to their facilities.
>
> Several issues were raised at our meeting and therefore I will respond to each one of them as follows:
>
> . DUE TO THE LOSS OF EQUIPMENT AND INABILITY TO SECURE VOLUME TRUCKLOAD TRAFFIC, DMSCC DOES NOT INTEND TO CONTINUE IN THIS BUSINESS ENVIRONMENT.
>
> . DRIVERS TERMINATED ON 3/31/01 WILL RECEIVE NO SEVERANCE OR COMPANY PAID INSURANCE AS REQUESTED. INSURANCE INFORMATION (COBRA) WILL BE FORWARDED TO EACH OF THE DRIVERS.
>
> DRIVERS WILL RECEIVE ACCRUED HOLIDAY PAY AS DISCUSSED.
>
> We regret the having to close this operation however based on the circumstances no other options were available. Should you have any questions, please call me at . . .

Regan testified that before he received this letter neither Berman nor any representative of the Respondent had spoken to him about possibly paying the drivers a reduced amount of severance pay or reduced health benefits; and that he filed an unfair labor practice charge. Berman testified that Regan tried to reach him a couple of times about this letter but he never got back in touch with Regan about this letter. On cross-examination Berman testified that after this letter he did not communicate with Regan at all; that he never told the Union that he thought the parties were at impasse; and that after this letter he was advised that Regan telephoned but he did not return these telephone calls.

By letter dated April 10 (GC Exh. 21), Regan advised Berman as follows:

> This correspondence is the Union's position in regards to the letter that you sent on April 3, 2001. The Union's Committee believes that you did not adequately address issues that were brought up during negotiations.
>
> Your response:
>
> Due to the loss of equipment and inability to secure volume truckload traffic, DMSCC does not intend to continue in this business environment.
>
> Our research and experience has proven that this statement is false and inaccurate. Your company has at least fifty (50) terminals and agents national wide, including Canada. Your agents found plenty of work for these drivers in the past.
>
> Also, during the organizing campaign, you fired a number of drivers for insubordination for not accepting agent loads, regardless of the fact that they did not have the legal hours or monies to handle the loads. You also attempted to negotiate a pay advance to cover their expenses.
>
> Therefore, the union is requesting the company negotiate in good faith over these outstanding issues.
>
> Please contact me to set up a meeting. Your prompt attention in this matte will be greatly appreciated.

Regan testified that Berman did not respond to this letter and neither he nor any other company representative ever contacted him regarding the Union's request to resume contract negotiations. Berman testified that he received and reviewed this letter and he did not consider there to be any open issues as far as the company was concerned; and that he did not respond to this letter because he had already stated the company's position. On cross-examination, Berman testified that he did not respond to this letter or the telephone calls that Regan made to him after he sent him this letter.

The Respondent's drivers who worked out of the Kenosha office also handled the Belvidere, Illinois to Toledo, Ohio run which was another movement of Chrysler engines and parts. This operation began in late 1999 or early 2000 and the Respondent was using five or six drivers on this run when the Respondent shut down in March 2001. Greene testified that after the Respondent shut its doors in March 2001 it transferred this run to its nonunion owner-operators and the run continued until May 5, 2001, when it was permanently shut down for the Respondent; that Berman made the decision to transfer the run to the owner/operators; and that the five or six owner/operators utilized their own tractors and Ryder vans on this run.

Regan testified that it was his understanding that the Respondent's entire Chrysler operation had been shutdown on March 31 when it terminated all of the senior drivers. On April 14 or 15, Regan was advised that the Respondent was using owner operators on the Chrysler Belvidere to Toledo run. He then filed an unfair labor practice charge. Regan also telephoned Berman the same day he filed the charge regarding this and 2 days later but he was only able to leave a message with the secretary that he needed to speak with Berman regarding the fact that the Respondent was still running Chrysler products with Dallas & Mavis owner operators. Regan testified that neither Berman nor any company representative returned his calls; and that the Company never went back to the bargaining table to discuss the truckloads, the severance package or the Belvidere to Toledo run. On cross-examination, Regan testified that he did not submit a letter to Berman specifically asking him to negotiate about the decision or the effects of the decision to have the Chrysler Belvidere to Toledo run handled by owner operators because he was relying "on the January [sic] [undoubtedly he was referring to April] 10th letter and the phone calls that [he] tried to unsuccessfully make to [Berman]." (Tr. 159.) On redirect Regan testified that Berman never indicated that he believed that the parties were at impasse; that regarding the Belvidere to Toledo run, he never received any notice from the Company that it was transferring this run to its owner operators and he was not given any opportunity to bargain about the effects of such a decision; and that he did not receive anything in writing from Berman with regard to the Belvidere to Toledo run. Whitehead testified that it was his understanding that the entire Chrysler had been shut down; that in April 2001 he was told that Respondent's Belvedere to Toledo run, which he and four other of Respondent's drivers handled, was being handled for the Respondent by owner operators; and that the Respondent did not give notice to the Union that it intended to transfer the Belvedere to Toledo run to owner operators and the Respondent never gave the Union an opportunity to bargain over the decision to transfer or the effects of this transfer. Stallings testified that when he was terminated it was his understanding that the entire Chrysler operation had been shut down, including the run he formerly handled from Belvidere to Toledo; that while driving for another company in April he came upon five of the Respondent's trailers and he talked to one of the drivers using his CB radio; that he determined, based on what the driver told him, that this was the Belvidere to Toledo run that he and four other drivers in the Chrysler operation formerly handled; that the Respondent never notified the Union that the Respondent intended to transfer the Belvidere to Toledo run to owner operators, and the Respondent never gave the Union an opportunity to bargain over this decision or the effects of this decision; and that the owner operators are non-union.

Berman testified that while at the final meeting Regan requested to meet and negotiate over the decision to terminate the operation, Regan did not request to meet and negotiate over the Belvidere to Toledo run, and Regan did not request to meet and negotiate over the effects of the transfer of this run to owner operators; and that the Respondent could not continue to operate the Belvidere to Toledo run with the Chrysler engine employees because it did not have the equipment to do so. On cross-examination Berman testified that the decision to transfer the Belvidere to Toledo run to the owner-operators was made in the final week of March 2001 at the same time he was in negotiations with the Union; that he did not provide the Union at that time with any notice that he intended to transfer the Belvidere to Toledo run to owner-operators; that he did not give the Union at that time any opportunity to bargain over the decision to transfer the work to owner-operators; that he did not give the Union any opportunity to bargain over the effects of such a decision; and that the owner-operators that he transferred the work to are nonunion.

Paragraph IV of the complaint, as here pertinent, alleges that dispatchers Gray and Koehler have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and/or agents of Respondent within the meaning of Section 2(13) of the Act. The Respondent specifically denies these allegations.[7]

Greene testified that the dispatchers assigned loads to the drivers typically without consulting with him, coordinated any problems that the drivers might run into, reassigned loads, let drivers take a day off when there were equipment problems without clearing it with him, contacted the customer if the shipment was going to be late, arranged with Ryder to have any on the road equipment problems taken care of, communicated with the drivers utilizing the Qualcom system, notified him if a driver did not receive his or her paycheck, monitored driver productivity utilizing the TMW software system and driver logs, notified him if there was a problem with a driver's performance, and recommended what type of action should be taken against the driver but he never followed a dispatcher's recommendation.[8] Greene also testified that he prepared the job description for the lead dispatcher, General Counsel's Exhibit 2, in concert with the Human Resources Department. Under "SUPERVISORY RESPONSIBILITIES" the following appears: "Oversees the dispatcher functions." Under the same heading in the job description for dispatchers, General Counsel's Exhibit 3, the following appears: "This job has no supervisory responsibilities."

McCall testified that he considered the three dispatchers to be his supervisors; that the dispatchers got him loads, reassigned loads, gave him instructions on how to get to a particular location, was the person he contacted if he was going to be late making a delivery, arranged to have Ryder make repairs when he was en route to a destination, straightened out a paycheck problem, and gave him time off when he was caught in a snowstorm in Chicago, Illinois, and could not get his truck out for 2 days.

Rice testified that Gray was the head dispatcher and he considered her to be a supervisor; that he obtained his loads from the dispatchers; that the dispatchers could reassign a load; that if he was going to be late on a delivery he contacted the dispatcher on duty; that if he had to leave work early he asked the dispatcher which was usually Gray; that he asked Gray to get home early 1 week and she okayed it over the telephone immediately; and that he concluded that he was terminated by Gray because after he refused a broker load to New York, Gray sent a message to him over the Qualcom in his truck indicating that rejecting loads would not be tolerated and so he should clean out his truck and take it to Racine.

Hester testified that he considered Gray and Koehler to be his supervisors. On cross-examination, Hester testified that the dispatchers do not have the authority to hire or fire drivers; and that in his affidavit to the Board he indicated as follows:

> They [dispatchers] do not have the authority to hire or fire drivers but they notify drivers when they are termi-

[7] While counsel for General Counsel includes dispatcher Lexer in his argument on brief regarding supervisory status, Lexer was not specifically named in either the complaint or the Respondent's answer to the complaint.

[8] Greene testified that he had terminated a driver and in some instances the dispatcher recommended termination.

> nated. I do not know if they can effectively recommend discipline or termination. [Tr. 259.]

Bigheart testified that Greene was her supervisor; that she did not know if the dispatchers had to consult with a manager or supervisor before they assigned or reassigned a load; that she asked the dispatcher on duty if she had to leave work early or took a day off; and that when she had a work related problem like sliding the tandems on the trailer she contacted the dispatcher on duty.

Stallings testified that his supervisor was Greene. As noted above, when dispatcher Koehler told him to turn in his truck on March 29 he told her that such a message had to come from Berman or Greene. Stallings also testified that dispatchers assigned loads; that he got directions to a location from dispatch; that if he was going to be late to a destination he would contact dispatch; that if he needed time off from work he would contact the dispatchers; that he reported an accident to dispatcher Gray; and that when he had a flat tire he contacted dispatcher Gray who told him that she was going to make arrangements with Ryder to repair the tire.

When called by the Respondent Greene testified that he was the immediate supervisor of the dispatchers; that he was responsible for the performance evaluations of the dispatchers; and that Respondent's Exhibits 4 and 5 are the "Performance Evaluation[s] Non-Supervisory employee" for Gray and Keohler (then her surname was Bizek), respectively. Greene signed both of the evaluations on February 27.

Analysis

Paragraph V(a) of the complaint alleges that on January 22 the Respondent, by Greene, in a telephone conversation threatened employees with closure of its operation if employees selected the Union as their collective-bargaining representative, and created the impression that employees' union activities were under surveillance. On brief counsel for General Counsel contends that Greene failed to specifically deny Stallings' testimony regarding either of these allegations; that Greens' threat to close the doors was unlawful because it lacked any rational basis; and that it would have been reasonable for Stallings to assume from what Greene said to him on January 22 that the drivers' union activities had been placed under surveillance. The Respondent, on brief, argues that even if Greene made the alleged statements, he was not making a threat, but merely inquiring into the union activity at the Company and, as allowed under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), predicting the potential consequences in view of Chrysler's economic troubles; that the eventuality of closing was dependent upon factors beyond the control of the Respondent; and that the alleged statements were predictions rather than threats.

As here pertinent, the United States Supreme Court concluded in *Gissel*, supra at 618 and 619 as follows:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." . . . As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." [Citations omitted.]

Greene's was not the only threat to close the operation. Hester's testimony about Gray threatening that the Respondent would close the Chrysler operation was not refuted by the Respondent in that it did not call Gray to the witness stand to deny making the statement. As concluded below, Hester's testimony about this threat is credited. Gray was a dispatcher who worked in the Respondent's Kenosha office under Greene's supervision during daytime hours when he would have been present at the facility. Without even getting into the question of whether she was a supervisor or agent of the Respondent, which matters will be dealt with below, one has to accept the fact that this threat was uttered by two different people at the Respondent's Kenosha facility. At the time Greene uttered the threat he had no knowledge of what demands the Union would make in negotiations for a collective-bargaining agreement. Without knowing this, without knowing if Ryder would reduce its rate, without knowing if Chrysler would back off its demand for a specific reduction, without knowing whether anyone else would bid on the contract, and without knowing what any competitor would bid, Greene could not have been making a prediction based on objective fact. Greene did not refer to demonstrably probable consequences beyond the Respondent's control. In this light, the statement was not a reasonable prediction based on available facts but rather a threat of retaliation based on union representation, and as such it is without the protection of the First Amendment of the United States Constitution.

As noted above, the Respondent argues that Greene "was merely inquiring into the union activity at the Company." (R. Br. 30) Gray told Greene about the union meeting which took place over the weekend at a union hall in Gary. The meeting was not held at the Company's facility. Stallings testimony is credited. Greene was less than candid about what he said to Stallings. Stallings did not first offer any information before he was questioned by Greene. Indeed, the Respondent does not take the position that at this time Stallings was an open union supporter or that it knew the role Stallings played in the organizing drive. Would Stallings reasonably assume from Greene's statement that the employees' union activities had been placed under surveillance? Under the circumstances extant here I do not see how one could find otherwise. The Respondent violated the Act as alleged in paragraph V(a) of the complaint.

Paragraph V(b) of the complaint alleges that in late January the Respondent, by Gray, in a telephone conversation threatened employees with closure of its operation if employees selected the Union as their collective-bargaining representative. On brief counsel for General Counsel contends that since Hester's testimony was not rebutted by the Respondent, Hester's testimony must be credited; that Gray's threat that the Company would close down was unlawful since it lacked any basis in fact; and that unlike Greene's earlier threat, Gray did not even attempt to link her "draconian" threat to the economics of the Chrysler contract. Additionally, as here pertinent, Counsel for General Counsel contends that Gray was a supervisor because she independently assigned loads to drivers, resolved problems they encountered while transporting freight, contacted shippers and brokers to find available loads, independently reassigned loads, monitored drivers' productivity, effectively recommended to Greene whether a driver should be disciplined and/or terminated, exercised discretion in terminating drivers for refusing a broker load, and to the extent she worked on weekends or might have occasionally worked between 7 p.m. and 7 a.m. when Greene and Berman were not at the facility, she would effectively have been in charge of the operation.[9] The Respondent, on brief, argues that the burden of proving supervisory status rests with the party asserting that supervisory status exists; that the duties of the person in question must be exercised with independent judgment on behalf of management and not in a routine manner; that there is no evidence that the dispatchers ever effectively recommended the hire, fire, or discipline of any of the involved employees; that mere suggestions are not effective recommendations; that, as here pertinent, Gray lacked the authority to hire, fire, or discipline; that Gray's responsibilities did not involve the exercise of independent judgment but were merely routine and clerical in nature; that, as here pertinent, Gray had no actual or apparent authority, and she was not an agent of the Respondent; and that, as here pertinent, Gray's alleged threat was isolated and not coercive.

First, did Gray make the threat. Gray was not called as a witness by the Respondent to deny making the threat. In light of this, Hester's testimony is credited. As noted above, Gray's threat of closure was not the only threat of this kind. Contrary to the Respondent's argument, a threat to close the operation if the employees decide to be represented by a union is coercive. Second, is the Respondent responsible for Gray's conduct. At the time she made the threat was Gray a supervisor or an agent of the Respondent. Section 2(11) of the Act defines a supervisor as follows:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The party alleging supervisory status has the burden of proof. The possession of any one of the indicia makes the individual in question a supervisor when the individual exercises or has the authority to exercise independent judgment. Rice's testimony that Gray was the head dispatcher was not refuted by the Respondent. While the aforementioned job description for dispatcher, General Counsel's Exhibit 3, indicates that "[t]his job has no supervisory responsibilities," the Respondent's job description for lead or head dispatcher indicates "**SUPERVISORY RESPONSIBILITIES**, Oversees the dispatcher functions." (GC Exh. 2.) Since Gray was the lead or head dispatcher, according to the Respondent's own job description she had supervisory responsibilities. In my opinion, however, the evidence is insufficient to show that Gray possessed supervisory authority within the meaning of the Act. Her direction, assignment, and reassignment of the drivers was routine. It was not shown that she exercised independent judgment with respect to hiring, transferring, suspending, laying off, promoting, adjusting grievances, firing, disciplining, or discharging, or that she made effective recommendations with respect thereto. Normally when Gray worked her 6 a.m. to 3 p.m. shift Greene was at the Respondent's Kenosha facility. And to the extent that Gray might have on occasion been the only one at the Respondent's facility, this alone would not be enough to warrant finding her to be a supervisor under the Act. *Ken-Crest Services*, 335 NLRB 777, 779 fn. 16 (2001).

Was Grey acting as an agent of the Respondent when she made the above-described threat to Hester? As pointed out by the Board in *Pan-Oston Co.*, 336 NLRB 305, 306 (2001):

> The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. . . . Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. . . . Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.
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> . . . .
>
> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. . . . The Board considers the position and duties of the employee in addition to the context in which the behavior occurred.
>
> The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. For example, in *Hausner Hard-Chrome of KY, Inc.*, [326 NLRB 426 (1998)], the Board found that the heads of varius departments who regularly communicated

[9] As noted above, Gray's normal hours were 6 a.m. to 3 p.m.

> management's production priorities to employees acted as agents of the employer when they told employees that the employer would likely shut down the plant if employees voted in favor of the union.
>
> . . . .
>
> Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with the statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority. For example, in *Hausner Hard-Chrome*, discussed above, the Board found that the "manifestation of apparent authority was strengthened" because the statements made by the department heads were consistent with statements made by management.
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> . . . .
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> [I]n *Cooper Industries*, [328 NLRB 145 (1999)], the Board found that employees could reasonably believe that employee facilitators who made various coercive statements acted as agents of the employer because the employer had held them out as primary conduits for communication with management.
>
> . . . .
>
> Finally, it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship. [Except as noted above, citations omitted.]

Gray, as here pertinent, was held out by the Respondent as a primary conduit for communication with management, her statement about closing was consistent with Greene's earlier statement to union "leader" Stallings that the operation would close if the employees brought in the Union, Gray regularly communicated management's position to the involved drivers, the employees would reasonably believe that Gray was reflecting company policy and speaking and acting for management, and Gray had apparent authority in that the Respondent created a reasonable belief that it had authorized Gray to make the same coercive threat Greene had made earlier. Gray was acting as agent of the Respondent when she made the above-described threat to Hester. The Respondent violated the Act as alleged in paragraph V(b) of the complaint.

Paragraph VI(a) of the complaint alleges that on January 24 the Respondent, by Greene, unlawfully modified its paycheck distribution policy. On brief Counsel for General Counsel contends that only one day after the Union's demand for recognition, the Respondent abruptly changed its long-standing paycheck distribution policy; that this meant that the involved drivers, some of whom lived in states other than Wisconsin, would have to wait days for the delivery of their paycheck by mail unless the drivers were willing to pay $7.50 to have the check sent by overnight mail; that similar to *Sivalls, Inc.*, 307 NLRB 986, 1003 (1992), the Respondent's change to the paycheck distribution policy was clearly in retaliation for the employee's union activities; that the abrupt nature and the timing establish unlawful motivation; that the failure of the Respondent to provide a plausible reason at the time for the abrupt change further underscores its retaliatory nature; that Greene's belated explanation is obviously inconsistent with his earlier testimony that the drivers were able to pick up their paycheck from the receptionist or the dispatchers, and the explanation makes no sense when one considers that the Respondent reverted to its original policy after a number of drivers complained about the change; and that the change was implemented at the same time that the Respondent was exhibiting its union animus by making clearly unlawful statements to its employees. The Respondent, on brief, argues that the change in the paycheck distribution policy was too insignificant to warrant an inference of animus or retaliation for union activity, *Lowery Trucking Co.*, 200 NLRB 672, 675 (1972); that this is especially so in light of the fact that the Respondent lost its receptionist; and that the change in the payroll policy lasted only a few days, and did stem from any discriminatory motive.

The Administrative Law Judge in *Lowery Trucking Company* found as follows:

> Regarding the contention that on January 28, Respondent changed its policy respecting distribution of paychecks by distributing them at 5 p.m. instead of 1 p.m., I find the record herein inadequate to establish what the prior practice was, and even if, as contended, a prior practice was changed, I find the change too insignificant to warrant an inference of animus or retaliation for union activity.

Obviously a change of 4 hours, without even knowing for sure what the previous practice was, is quite different than the situation at hand. The Administrative Law Judge in *Sivalls, Inc.*, supra, indicated that timing is a crucial consideration in assessing motivation. Here either on the same day or a day after Regan asked Berman for recognition, pointing out that the Union had a majority, this change was implemented. In the past, when the receptionist was not present, drivers got their paychecks from the dispatchers. When the obvious was allegedly pointed out to Berman, namely that drivers were complaining because they had bills to pay and they could not wait days to receive their paychecks in the mail, the old policy was reinstated. Why was it necessary to change the policy in the first place? The lack of a receptionist in the past did not result in mailing the paychecks to drivers. And the lack of a receptionist from the time the old policy was reinstated up to the closing of the operation did not cause any problems which were made a matter of record. The January 24 or 25 change was retaliatory. It also occurred because Berman had not granted at that time the Union's request for voluntary recognition and he wanted to remind the drivers that the Respondent controlled the purse strings; the Respondent could make things difficult for the drivers. Berman's unspoken message was that bringing the Union in could have previously unforeseen consequences for the drivers, namely to even get their paycheck a day late they would have to reach into their own pocket and give the Respondent $7.50 (for overnight mail) every Wednesday. With respect to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393

(1983), counsel for General Counsel has demonstrated that drivers in the Respondent's Chrysler operation engaged in union activity, and Berman was placed on notice on January 24 that a majority of them had memorialized their support for the Union. This was after the Respondent told Stallings, the employee leader of the union movement, that if the employees succeeded in bringing in the Union, the operation would close. So we have an adverse action against employees, the change in the paycheck policy, on either the same day or the day after the Respondent was told that a majority of the employees wanted the Union, and within 2 or 3 days after the Respondent demonstrated its antiunion animus by threatening to close the Chrysler operation. Counsel for General Counsel has made a prima facie showing. As noted above, the Respondent did not give the drivers a reason when it changed the policy on January 24 or 25. The reason it gave at the trial herein, in my opinion, is not a business justification in that, as noted above, drivers were able to get their paychecks in the absence of the receptionist both during her absences and after she left the employ of the Respondent. The Respondent has not demonstrated that the paycheck policy would have been changed in the absence of the above-described union activity. Knowing how much it means to a worker to receive the reward for his toils in a timely fashion, this action by the Respondent was significant. The Respondent violated the Act as alleged in paragraph VI(a) of the complaint.

Paragraphs VI(b), (c), and (d), respectively, of the complaint allege that on January 26 the Respondent unlawfully discharged Bigheart, McCall, and Rice.[10] On brief Counsel for General Counsel contends that before it terminated these three drivers the Respondent knew that a majority of its drivers had authorized the Union to be their exclusive collective-bargaining representative; that knowledge of the union activities of these three drivers can be inferred from the fact that (1) Respondent admittedly relied on employee informants to provide it with specific information concerning the organizing campaign, (2) Respondent threatened the closure of its operations, created the impression that employees' union activities were under surveillance, and changed a long-standing paycheck distribution policy for discriminatory reasons, (3) these three drivers wore union buttons to work on a daily basis and the Respondent's receptionist saw McCall and Bigheart wearing their union buttons on January 24, and (4) Respondent terminated these three drivers for a pretextual reason only a few days after the Union demanded recognition; that Greene's testimony about the change in Respondent's policy from July 2000 on regarding broker loads was belied by the fact that other drivers refused broker loads during this period, including on January 26, and they were not disciplined or even told that rejection of broker loads was grounds for discipline and/or termination; that Greene's inconsistent testimony regarding broker loads and the failure of the Respondent to call the dispatchers to testify about the policy clearly establish the non-mandatory nature of broker loads; and that McCall and Bigheart did not have enough DOT hours to lawfully transport the broker load to New York. The Respondent, on brief, argues that the General Counsel failed to establish that the Respondent knew of the alleged concerted activity, as here pertinent, of these three discharged employees and that there was union animus or discriminatory motivation; that while discriminatory motivation can be inferred from inconsistencies between the proffered reason for the discharges and other actions of the employer, disparate treatment of similar employees with similar offenses, and a company's deviation from past practices in implementing the discharges, here counsel failed to establish any inconsistencies between the proffered reasons for terminating the three employees and failed to provide any evidence of disparate treatment; that while the counsel for General Counsel argues that the timing of the discharges is suspicious, suspicion does not substitute for proof; that the Respondent would have discharged these three drivers even in the absence of union activity in that they were insubordinate when they refused the broker load; that "the fact that [the Respondent] had not previously terminated any employee for refusing broker loads provides no evidence of disparate treatment where, as here, the employee instituted a new policy";[11] that whether others have been discharged for refusing broker loads prior to January 26 is of no moment; that "[i]n July of 2001 [sic] [the Respondent] established a new policy for its employees, which it renewed in November of 2000";[12] that beginning in July of 2000 the Respondent began communicating to its drivers that if they did not take loads, they would be terminated; that "the fact that . . . Stallings, the first employee to refuse a broker load on January 26 was not fired, also fails to provide evidence of disparate treatment [in that], Greene's reluctance to fire [Stallings] displays . . . Greene's disagreement with [the Respondent's] new policy";[13] and that

> While [the Respondent] was unaware of the union activity of the drivers who were terminated, it had knowledge that Chester Stallings was a vocal union supporter and organizer, yet failed to seize upon this alleged opportunity to retaliate against him for his union activity. For the General Counsel to argue that [the Respondent] discharged the drivers in question in order to retaliate against its entire [work force] for organizing a union which [the Respondent] recognized voluntarily defies logic, where one of the Union's staunchest supporters was not fired pursuant to the new policy.[[14]]

The Respondent did not initially recognize the Union when the demand was made on January 24. And when the Respondent did recognize the Union on February 15, it was only after Greene reviewed the petition and copies of the cards but refused to sign the recognition agreement. As was pointed out by Regan, the review of the petition and the copies of the cards

[10] The complaint alleges that the discharge of Bigheart occurred in a telephone conversation with Greene, the discharge of McCall occurred in a telephone conversation with Gray, and the discharge of Rice occurred in a Qualcomm computer message from Gray.

[11] The R. Br., p. 18.
[12] Id.
[13] Id. at 19.
[14] Id.

was, arguably, sufficient to accomplish recognition.[15] Since Greene refused to sign the recognition agreement after reviewing the petition and the cards, it appears that his initial review of the petition and cards was not done with the intent of recognizing the Union if all was in order. Consequently, it appears that Green unwittingly engaged in conduct which resulted in recognition as opposed to intentionally, voluntarily recognizing the Union. Regan indicated that he was going to telephone the Respondent's lawyer apparently to make sure that the Respondent fully appreciated what had occurred. When Stallings left the Respondent's Kenosha office without Greene's signature on the recognition agreement, Greene was trying to get in touch with the Respondent's lawyer. Later Greene had Stallings return to the Respondent's Kenosha office and Greene then, after again reviewing the petition and the copies of the union authorization cards, signed the recognition agreement memorialized what had already been accomplished by his review of the petition and cards. Initially, the Respondent did not intentionally, voluntarily recognize the Union. The Respondent signed the recognition agreement only after Greene had already unwittingly recognized the fact that the Union had the support of the majority of the involved employees by voluntarily utilizing a method other than an election.

As set forth by the Board in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991):

> In *Wright Line*, [supra], the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations and footnotes omitted.]

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

Counsel for General Counsel has established that many of the Respondent's employees attended a meeting at a union hall in Gary; that Greene was told about the union meeting; that Greene told Stallings he knew about the union meeting, he asked Stallings about union activity and threatened to close the Respondent's Kenosha facility; that Regan, in demanding recognition on January 24, told Berman that a majority of the Respondent's employees had memorialized their support for the Union; and that the Respondent changed its paycheck distribution policy after being notified of the employees' efforts in support of the Union. General Counsel has demonstrated union activity of most of the Respondent's employees, employer knowledge that the majority of its employees support the Union, anitunion animus by way of the first threat to close and the change in the paycheck policy, and adverse action against those suspected of involvement which has the effect of discouraging union activity. For these reasons and for other reasons set forth below, General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision.

Has the employer demonstrated that the same action would have taken place notwithstanding the protected conduct? The Respondent appears to argue two different ways on the same issue. First, the Respondent argues that Greene was reluctant to fire Stallings, who allegedly was the first to refuse a broker load on January 26, and who was a "vocal union supporter" because Greene disagreed with the new policy. This would have meaning only if the new policy was first implemented on January 26 and Greene took the actions he did because he was told to. But this is not Greene's testimony. Greene testified that he and Berman in July and November 2000 told the dispatchers to tell the drivers about the new policy if they refused a broker load. The "new" policy was not implemented in July 2000 and it was not renewed in November 2000. Greene's testimony regarding this is not credited. The dispatchers who, according to Greene's testimony were the ones who allegedly told the drivers about this "new" policy in July and November 2000 were not called as witnesses to corroborate Greene. Those drivers who testified did not corroborate Greene. The policy was first announced on January 26. But it was not a new policy for all of the involved drivers. The Respondent concedes that Greene did not enforce the policy with respect to Stallings. On brief the Respondent argues that Greene did not because he disagreed with the policy. The fact of the matter is

[15] *Jerr-Dan Corp.*, 237 NLRB 302 (1978); and *Brown & Connolly, Inc.*, 237 NLRB 271 (1978). It appears that by reviewing the petition and the copies of the union authorization cards the Respondent, through Greene, agreed to use a method other than an election to determine employee sentiments. In taking this approach, the Respondent agreed to be bound by the results of the card check. The Union had already demanded recognition on January 24 from Greene's boss, Berman, and there would not have been a misunderstanding on the part of Greene as to the purpose of reviewing the petition and the copies of the union authorization cards. As Judge Wallace Nations concluded in *Research Management Corp.*, 302 NLRB 627 at 639 (1991):

> The Respondent did not have the authorization cards thrust in its face. The Union made an offer to prove its majority support through a card check. The Respondent was free to reject the offer. . . . Having made a reasoned decision to accept the Union's offer, the Respondent is not free to reject what it voluntary sought to learn. On being informed of the Union's majority support, it was obligated to bargain with the Union.

that the Respondent did not enforce the change in policy against Stallings because he was a vocal union supporter. The Respondent appreciated that it would be more subtle to enforce the changed policy against less vocal union supporters. The same point could be made and the risk incurred in making the point would be far less. The Respondent's treatment of Rice, McCall, and Bigheart, on the one hand, and, on the other, Stallings and Whitehead, who also refused a broker load on January 26 and was not even told by the dispatcher that refusing a broker load was grounds for discipline or termination, demonstrate the Respondent's disparate treatment of employees with similar conduct. Also, the Respondent deviated from past practice in disciplining Rice, McCall, and Bigheart. It had been the Respondent's past practice to allow all of the drivers to refuse broker loads. All of a sudden what was acceptable in the past became unacceptable for some but not all. Not only were drivers other than the three not disciplined for refusing broker loads on January 26, the other drivers who refused broker loads on January 26 were not even told about the Respondent's changed policy. Why weren't the other drivers told about this change in policy? Obviously because it was not the Respondent's policy, except for Rice, McCall, and Bigheart.

One has to also ask if the degree of discipline administered by the Respondent was reasonably related to the seriousness of the employees' conduct and the record of the employee in his or her service to the Respondent. What was not an offense until January 26 allegedly became an offense, at least with respect to Rice, McCall, and Bigheart. It was not shown by the Respondent that the involved conduct was an offense on January 26 with respect to other of the Respondent's employees, especially those who engaged in the same conduct and were not even told about the "new" policy. To discharge three people citing a rule which existed only on January 26, and which existed only with respect to these three people, indicates to me that not only wasn't the discipline reasonably related to the seriousness of the alleged offense but there was no real "offense" to begin with. The rule was changed for these three drivers only, and when they followed the accepted practice for all of the other drivers they were discharged. Why? The only thing that had changed was the Union involvement. Contrary to any impression the Respondent may have attempted to convey, the past service of these three drivers was not even taken into consideration. The Respondent has not shown that Rice, McCall, and Bigheart would have been discharged notwithstanding the employees' protected conduct.

As pointed out by the Board in *Kajima Engineering*, 331 NLRB 1604 (2000):

> It is well established that where there is no direct evidence, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. . . . Such circumstances may include the employer's demonstrated knowledge of general union activity, the employer's demonstrated union animus, the timing of the discharge in relation to the employee's protected activities, and the pretextual reasons for the discharge asserted by the employer. [Citations omitted.]

Here Rice, McCall and Bigheart were terminated two days after Regan demanded recognition from Berman and Berman did not grant recognition. These discharges occurred four days before another discriminatory discharge. The record contains substantial evidence of antiunion animus. All three of the employees discharged on January 26 wore union buttons. While there is no direct evidence that any supervisor saw the buttons, there is compelling circumstantial evidence that warrants an inference that the Respondent knew of or at least suspected these three employees of engaging in union activities or harboring union sympathies and that it terminated them in reaction to the employees' union activities, particularly the Union's demand for recognition. *E. Mishan & Sons, Inc.*, 242 NLRB 1344 (1979). Also, there is a sufficient basis to infer that the Respondent knew of the union activity of the three employees terminated on January 26. General Counsel has established that union activity was a motivating factor in the Respondent's decision to terminate them. In the absence of any legitimate basis for their terminations, the Respondent has not met its burden of demonstration that the terminations would have occurred even in the absence of the employees' protected conduct. The Respondent violated the Act as alleged in paragraphs VI(b), (c), and (d) of the complaint.

Paragraph VI(e) of the complaint alleges that on January 30 the Respondent, by Greene, at Respondent's facility, unlawfully discharged Brooks. At the trial herein the Respondent moved to strike this paragraph of the complaint arguing that Counsel for General failed to establish a prima facie case of protected concerted activity known to the Company in that management did not see Brooks with a Union button or sticker. Also the Respondent pointed out that Brooks did not testify in support of allegation of discrimination. The motion was taken under advisement. On brief Counsel for General Counsel contends that with regard to Brooks' own union activities, knowledge can again be inferred from the facts that (1) Respondent admittedly relied on employee informants to provide it with specific information concerning the organizing campaign, (2) Respondent reacted swiftly to rumors of an organizing campaign by threatening employees with closure of its operations, creating the impression that its employees' union activities were under surveillance, and abruptly changed its long-standing paycheck distribution policy for discriminatory reasons, (3) Brooks wore a union button to work, (4) Respondent terminated Brooks only one week after the Union's initial demand for recognition, and (5) Respondent terminated Brooks for a pretextual reason;[16] that the record establishes that the Respon-

[16] The following appears in fn. 15 at p. 34 of the brief of the counsel for General Counsel:

> The Judge should discredit Greene's clearly self-serving testimony that, on January 23 or 24, Brooks informed him that he had been approached to sign a card and refused. Respondent did not present this evidence during the Regional Office's administrative investigation or at any other time as would normally be expected. In fact, it was only after Respondent was put on notice that Brooks would not be available to testify (or contradict other witnesses' testimony) that Greene fabricated this unbelievable story for the first time. Moreover, even if true, Brooks' mere denial of involvement would not have necessarily con-

dent's 'motivation factor' in terminating Brooks was his personal union activities and/or the drivers' collective effort to organize; that the only reason proffered by the Respondent for termination Brooks is that he was outside the insurance standards but in evaluating the pretextual nature of this reason, one must merely look at the fact that the Respondent admittedly had knowledge of and yet tolerated Brook's less than perfect driving record for almost 2 years; that not coincidently, only one week after Brooks signed an authorization card and the Union made its demand for voluntary recognition, the Respondent suddenly terminated Brooks for being outside the insurance standards; that in March 2000 when Ryder recommended to Respondent that Brooks be terminated based on their review of his driving record, Greene's independent investigation confirmed that Brooks' driving record was outside the insurance standards but he simply placed Brooks on 6 months' probation; that in late summer 2000 an audit from the Respondent's insurer again notified the Respondent that Brooks' driving record was outside insurance standards and the Respondent continued to employ Brooks; that in December 2000 when Greene saw the audit from the Respondent's insurer he took no action regarding Brooks; that Greene admitted that when Brooks was terminated by the Respondent he had not had any accidents or traffic tickets since October 8, 1999; and that the only other driver who was terminated because of a poor driving record was Lewis, who had her license suspended so that she could not drive Respondent's trucks. The Respondent, on brief, argues that even assuming that knowledge of Brooks' alleged protected activity can be inferred, the General Counsel has nonetheless failed to establish that Brooks was discharged out of anti-union animus, as opposed to his poor driving record; that although the General Counsel contends that such knowledge should be inferred by virtue of the timing of Brooks' termination, the General Counsel failed to provide sufficient evidence to support such an inference, failed to call Brooks to the stand, and, therefore, failed to establish a prima facie case in regards to Brooks since it is based exclusively on speculation and conjecture; and that accordingly, the allegations of improper discharge pertaining to Brooks should be stricken and the allegations dismissed.

The Respondent's renewed motion to strike is hereby denied. It is not necessary for an alleged discriminatee to testify to find a violation of the Act if the evidence of record supports such a finding. Here it does.

As noted above, the Board in *Fluor Daniel, Inc.*, supra, concluded that "when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." (footnote omitted.)

Notwithstanding the fact that Ryder and the Respondent's insurer found Brooks driving record to be below their standards, the Respondent retained him for some time after it was aware of these findings. Subsequently nothing changed with respect to his driving record. What did change, however, was the Union organizing drive which resulted in a majority of the Respondent's employees memorializing their support for the Union and the Union demanding recognition. Citing Brooks' driving record was a pretext. And the Respondent appreciates how obvious this is for on brief the Respondent now advances another alleged reason, namely, that Brooks failed to disclose his poor driving record information on his application for employment. No evidence was introduced at the trial herein that there was a problem with Brooks' application for employment. Neither of Respondent's witnesses testified that this was the reason that Brooks was terminated. Additionally, Brooks' application was not introduced into evidence. Moreover if there was a problem with what information Brooks gave about his driving record on Respondent's employment application, the Respondent was placed on notice regarding Brooks' driving record while he was an employee and the Respondent took no action at the time about any alleged shortcomings on Brooks' application. Additionally, by law, Joint Exhibit 1, the Respondent was required to check Brooks' driving record for the preceding 3 years in every state in which Brooks held a motor vehicle operator's license or permit during those 3 years. The reason that the Respondent gives for Brooks' termination does not withstand scrutiny. It is pretextual. As concluded in *Fluor Daniel, Inc.*, supra, an inference is warranted that the real reason for Brooks' termination is an unlawful one that the Respondent desires to conceal.

If this case were decided under *Wright Line*, supra, General Counsel has shown that a majority of the involved drivers engaged in union activity; that the Respondent was aware of the extent of the employees' union activity since the Union demanded recognition indicating that a majority of the employees had memorialized their support; that the Respondent then proceeded to go after drivers who were made vulnerable either by (a) the Respondent changing a policy with regard to some but not all of its employees, especially not the most vocal Union supporters, or (b) the Respondent no longer accepting an employee's driving record which it had accepted for some time before the union activity; and that there was significant anti-union animus on the part of the Respondent. On the other hand, the Respondent has not shown that the same action would have taken place notwithstanding the protected conduct of Brooks and his fellow employees. Brooks was not terminated before the union activity. Nothing changed until the union activity. If there was no business justification for terminating Brooks before the union activity, the Respondent has not shown that there was a business justification for terminating Brooks after the union activity culminated in a demand for recognition and a denial of that demand on January 24. The Respondent violated the Act as alleged in paragraph VI(e) of the complaint.

Paragraph VI(f) of the complaint alleges that on April 1 the Respondent, by Berman, unlawfully transferred unit work to owner operator drivers. On brief counsel for General Counsel contends that an employer's decision to transfer unit work outside the bargaining unit is a mandatory subject of bargaining since it simply involves "the substitution of one group of workers for another to perform the same work . . . under the ultimate

vinced Respondent that he was innocent of union activity given his wearing of a union button.

It should be noted that counsel for General Counsel did not make what was presented during the administrative investigation a matter of record at the trial herein.

control of the same employer for lower wages," *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 (1994); and *Torrington Industries*, 307 NLRB 809 (1992); that an employer violates Section 8(a)(1) and (5) of the Act by transferring work performed by unit employees to others outside the bargaining unit without providing the union notice or an opportunity to bargain; that an employer violated Section 8(a)(1) and (3) where it terminates unit employees and transfers their work to others outside the bargaining unit to avoid having to deal with a union, *Ferragon Corp.*, 318 NLRB 359, 360–362 (1995);[17] that an employer had previously made threats of closure is sufficient to establish that the decision to transfer work was motivated by union animus, *Westchester Lace, Inc.*, 326 NLRB 1227 (1998); that on March 30, at the second bargaining session, Berman misrepresented to the Union and the individual drivers that the entire Chrysler operation had been shut down, including the Belvidere-Toledo run; that Berman admitted that he surreptitiously transferred the Belvidere-Toledo run to the Respondent's non-union drivers the same week that the second bargaining session was held, and he also conceded that the Respondent never provided the Union with any notice or opportunity to bargain about the decision to transfer the Belvidere-Toledo run to its nonunion drivers; that Regan attempted to discuss the new revelations concerning the nonunion drivers doing the Belvidere-Toledo run with Berman, leaving two messages with Berman's secretary requesting that Berman call him back to discuss this and other outstanding issues; that Berman never returned Regan's telephone calls or returned to the bargaining table to bargain about the decision to transfer the Belvidere-Toledo run to the non-union drivers; that the Respondent continued to utilize its nonunion drivers to do the Belvidere-Toledo run until it actually shut down this aspect of the operation on May 5; and that the violation of Section 8(a)(1) and (3) is supported by the facts that the Respondent (1) knew of its union drivers' organizing activities, (2) knew that Belvidere-Toledo drivers Stalliings and Whitehead were the most ardent union supporters based on their participation on the Union's bargaining committee, (3) harbored strong union animus based on its commission of other unfair labor practices, including multiple threats to close its operation if the drivers selected the Union as their collective-bargaining representative, (4) surreptitiously transferred the Belvidere-Toledo run to its nonunion operators only about one month after it recognized the Union, and (5) provided 'lack of equipment' as the only reason for transferring the work to the non-union drivers even though "the non-union drivers admittedly used the same equipment as the union drivers." (GC Br., p. 41.)

The Respondent, on brief, argues that it was not obligated to bargain with the Union regarding either its decision to transfer the Belvidere-Toledo run or the effects thereof because the decision involved a change in the nature, scope and direction of the Respondent's business and any bargaining regarding this decision would have been futile; that the decision to transfer the work was not motivated by labor costs, but rather the Respondent's decision to close the Chrysler Engine Operation and, thus, discontinue the use of employees who had handled the traffic; that the Respondent returned its trucks to Ryder in anticipation of phasing out this aspect of its business; that any attempt on behalf of the Respondent to negotiate with the Union regarding the decision to transfer work to Belvidere would have been futile, as no concessions the Union could have offered would have reversed the closing; that this transfer was not a mandatory subject of bargaining; that the Union waived its right to bargain over the effects of the decision to transfer the work by failing to request such bargaining; that the Union never made a clear request to bargain after it became aware of the Respondent's alleged transfer of bargaining unit work to non-Union drivers; that Regan testified that he only made a single telephone call to Berman after Regan became aware of the continuation of the Belvidere run; and that Regan's testimony confirms the Union's failure to request that the Respondent bargain with it regarding the decision to transfer its Belvidere run to owner-operators, and the effects thereof.

General Counsel's contention that the nonunion drivers used the same equipment as the union drivers on the Belvidere-Toledo run is one-half correct. The owner-operators used the same trailers as the union drivers but the owner-operators used their own tractors. The Respondent argues that the situation at hand should be treated as a relocation involving a change in the nature, scope and direction of the Respondent' business. Physically the only change was that the Respondent turned in the tractors it leased from Ryder and then paid to use the tractors owned by the owner-operators. The Respondent could have continued to use five leased tractors from Ryder or it could have leased five tractors from another company from March 31 to May 5. There was no relocation and there was no change in the nature, scope and direction of the Belvidere-Toledo run from March 31 to May 5. The Respondent misled the Union when it left the impression that all of the Chrysler operation had been shut down by March 31. The Respondent purposefully avoided engaging in any, let alone meaningful, negotiations with the Union about this transfer of unit work. As pointed out by counsel for General Counsel on brief, transferring unit work outside the bargaining unit is a mandatory subject of bargaining. The Respondent did not give the Union notice and an opportunity to bargain regarding the Respondent's decision to transfer unit work to nonunion owner operators. The Respondent did not even present the Union with a fait accompli. The Respondent engaged in deceitful conduct and then when the conduct was discovered, the Respondent would not even return the Union's calls which it knew related to the fact that the Respondent's deceit had been discovered by the Union. The Respondent violated the Act as alleged in paragraph VI(f) of the complaint.

Paragraphs VIII(a), (b), (c), and (d) of the complaint collectively allege that on March 30 the Union, by Regan, requested that Respondent bargain collectively with the Union over the effects of its decisions to close its Chrysler operation and the Respondent's decision to transfer unit work to its owner-operator drivers, and since April 3 the Respondent has failed and refused to bargain collectively with the Union about these subjects which are mandatory subjects for the purposes of collective bargaining. On brief counsel for General Counsel con-

[17] In the instant proceeding, the Respondent terminated five union drivers who drove the Belvidere-Toledo run.

tends that while an employer has the right to close its operations for any reason and there is no attendant duty to bargain over such a decision, an employer is obligated to give the union timely notice and afford the union an adequate opportunity to bargain over the effects of its decision to close its business operations in a meaningful manner and at a meaningful time, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); that here on March 28 and 29, without providing any advance notice to the Union, the respondent's dispatchers began to instruct the drivers to turn in their trucks to the Ryder terminal in South Bend; that when the drivers attempted to ascertain the reason for this directive, they were told that it was over and all the trucks had to be turned in before the license plates expired on March 31; that despite Berman's assurances that he would consider the Union's March 30 proposals, namely, that laid off drivers be given 2 months of severance pay and health insurance benefits, the Respondent never had any intention of engaging in meaningful negotiations; that this is evidenced by the fact that only four days later, on April 3, Berman faxed to the Union a one-page letter summarily stating that the Chrysler drivers would neither be retained on broker loads, nor given any severance package; that this letter did not explain why the Respondent had rejected the Union's severance package proposals, it did not make a single counter proposal to the Union, and it did not declare an impasse; that by April 3 the Respondent had already refused to bargain in good faith over the effects of its decision to close the Chrysler operation by (1) failing to provide the Union with "pre-implementation notice" of its decision to close the operation and, thereby failing to satisfy its effects-bargaining obligation, *Geiger Ready-Mix Co. of Kansas City*, supra, 1022 at fn. 8, and (2) summarily rejecting the Union's severance package proposals; and that after April 10 the Respondent continued to engage in bad faith bargaining when Berman failed to respond to Regan's letter and telephone messages which requested further bargaining about effects of the decision to close the Chrysler operation.

The Respondent, at page 33 of its brief, argues as follows:

> Because [the Respondent] voluntarily recognized the Union and the General Counsel failed to provide any evidence that [the Respondent] or its officers or agents exhibited any anti-union animus or discriminatory motivation, the totality of [the Respondent's] bargaining conduct exhibits its good faith effort to bargain over the effects of the cessation of its operations.

Here the Respondent failed to provide the Union with preimplementation notice of its decision to close its Chrysler operation. Rather, the Respondent presented the Union with a fait accompli. Obviously this did not satisfy the Respondent's effects bargaining obligation. The Respondent also did not engage in meaningful negotiations in that it summarily rejected the Union's proposals without adequately explaining why, did not make any counter proposals and it did not disclose in a candid, honest, truthful fashion that it intended to continue a part of the Chrysler operation. The Respondent misled the Union. The bargaining that took place was not sufficient to meet the employer's obligation to bargain over the effects of the decision to close the Chrysler operation and the decision to transfer unit work, the Belvidere-Toledo run, to non-union owner-operators. The Respondent violated the Act as alleged in paragraphs VIII(a), (b), (c), and (d) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by (1) threatening employees with closure of its operation if the employees selected the Union as their collective-bargaining representative, and (2) creating the impression that employees' union activities were under surveillance.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by (1) modifying its paycheck distribution policy, (2) discharging Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks, and (3) transferring unit work to owner-operators.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the Union about the effects of its decision to close its Chrysler operation and its decision to transfer unit work to its owner-operator drivers.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that the Respondent unlawfully terminated Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks, it will be recommended that the Respondent be ordered to make them whole for any loss of earnings or benefits they may have suffered, from the time of their discharge to the date the Chrysler operation was closed, as a result of the Respondent's unlawful conduct, in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the Union about the effects of its decision to close its Chrysler operation and its decision to transfer unit work to its owner-operator drivers, it will be recommended that Respondent make Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks, and its other unit employees who were terminated on or about March 31, 2001, when the Respondent closed its operation, whole by paying those employees' normal wages for a period specified by the National Labor Relations Board, plus interest.

The Respondent will be required to expunge from its records any reference to the unlawful discharges of Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks.

It shall be recommended that the Respondent, on request, bargain collectively with the Union with respect to (1) the effects of its decision to close the Chrysler operation, and (2) its decision to transfer the Belvidere-Toledo run to non-union drivers, and to embody any understanding reached into a signed agreement.

On these findings of fact and conclusions of law and o the entire record, I issue the following recommended[18]

ORDER

The Respondent, Dallas & Mavis Specialized Carrier Co. of Kenosha, Wisconsin, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees with closure of its operation if the employees selected the Union as their collective-bargaining representative, and creating the impression that employees' union activities were under surveillance.

(b) Unlawfully modifying its paycheck distribution policy, unlawfully discharging employees, and unlawfully transferring unit work to owner-operators.

(c) Unlawfully failing and refusing to bargain collectively with the Union about the effects of its decision to close its Chrysler operation and its decision to transfer unit work to its owner-operator drivers.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the effects of its decision to close the Chrysler operation, and concerning the decision to transfer unit work to its owner-operator drivers.

(b) Make Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks whole for any loss of earnings and other benefits as a result of the discrimination against them, in the manner set forth in the remedy section of the decision, and make them, and its other unit employees who were terminated on or about March 31, 2001, when the Respondent closed its operation, whole by paying these employees' normal wages for a period specified by the National Labor Relations Board, plus interest

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days of service by the Region, mail a copy of the attached notice marked "Appendix"[19] to the Union and to all the employees who were employed out of its place of business in Kenosha, Wisconsin, at any time from the onset of the unfair labor practices found in this case until March 31, 2001. The notice shall be mailed to the last known address of each of he employees after being signed by the Respondent's authorized representative.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT threaten you with closure of our operation if you select the International Brotherhood of Teamsters, Local No. 142, AFL–CIO as your collective-bargaining representative.

WE WILL NOT create the impression that your union activities were under surveillance.

WE WILL NOT unlawfully modify our paycheck distribution policy.

WE WILL NOT unlawfully discharge employees.

WE WILL NOT unlawfully transfer unit work to owner-operators.

WE WILL NOT unlawfully fail and refuse to bargain collectively with the International Brotherhood of Teamsters, Local No. 142, AFL–CIO about the effects of our decision to close our Chrysler operation and about our decision to transfer unit work to our owner-operator drivers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects of our decision to close the Chrysler operation, and concerning the decision to transfer unit work to our owner-operator drivers.

WE WILL make Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks whole for any loss of earnings and benefits suffered as a result of their termination, less any net interim earnings, plus interest, and WE WILL make them and our other unit employees who were terminated on or about March 31, 2001, when we closed our Chrysler operation, whole by paying these employees' normal wages for a period specified by the National Labor Relations Board, plus interest

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Madonna Bigheart, Leslie McCall, Dennis Rice, and John Brooks, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

DALLAS & MAVIS SPECIALIZED CARRIER CO.